

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(1) IN GENERAL/1. The path to recognition.

## RESTITUTION (

### 1. INTRODUCTION

#### (1) IN GENERAL

##### 1. The path to recognition.

The law of restitution is that part of the law which is concerned with reversing a defendant's unjust enrichment at the claimant's expense. English law was slow to recognise the existence of an independent law of restitution. For many years the rules which today are recognised as component parts of the law of restitution were either labelled as quasi-contract, and thus treated as an appendage of the law of contract<sup>1</sup>, or they were scattered around the textbooks on equity<sup>2</sup>. During that period restitution was considered to be 'no more than a heterogeneous collection of unrelated topics'<sup>3</sup>. But this was to change in 1991 when the House of Lords stated that the law of restitution was not based upon implied contract and recognised the existence of an independent law of restitution based upon the principle that unjust enrichments must be reversed<sup>4</sup>. The independence of the law of restitution and its foundation in the principle that unjust enrichments must be reversed is now clearly established<sup>5</sup> and has been repeatedly affirmed in the appellate courts<sup>6</sup>. The need to distinguish clearly between the law of contract and the law of restitution has been affirmed by the judiciary<sup>7</sup>.

1 The language of implied contract or quasi-contract survived until very recently: see eg *Guinness plc v Saunders* [1990] 2 AC 663 at 689, 692-693, [1990] 1 All ER 652 at 658, 661-662, HL, per Lord Templeman; *Pan Ocean Shipping Ltd v Creditcorp Ltd* [1994] 1 All ER 470 at 479, [1994] 1 WLR 161 at 170, HL, per Lord Woolf (quasi contract).

2 The integration of equitable principles concerning restitution has been said to be 'the greatest challenge in the law of restitution': Beatson *The Use and Abuse of Unjust Enrichment* (1991) Ch 9.

3 Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 5.

4 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL. There are of course earlier dicta which support the existence of an independent law of restitution: see eg *Moses v Macferlan* (1760) 2 Burr 1005 per Lord Mansfield; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32 at 61, [1942] 2 All ER 122 at 135, HL, per Lord Wright.

5 There remain, however, some dissenting voices: see eg Stoljar 'Unjust Enrichment and Unjust Sacrifice' (1987) 50 MLR 603; Stoljar *The Law of Quasi-contract* (2nd Edn, 1989) pp 5-10 (an account of a proprietary theory); Hedley 'Unjust enrichment as the basis of restitution--an overworked concept' (1985) 5 Legal Studies 56; Hedley *A Critical Introduction to Restitution* (2001).

6 See eg *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 710, [1996] 2 All ER 961 at 993, HL, per Lord Browne-Wilkinson ('in my judgment, your Lordships should now unequivocally and finally reject the concept that the claim for moneys had and received is based on an implied contract'); *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153 at 167, [1997] 4 All ER 641 at 649, HL, per Lord Goff of Chieveley; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227, [1998] 1 All ER 737 at 740, HL, per Lord Steyn; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 373, [1998] 4 All ER 513 at 530, HL, per Lord Goff of Chieveley; *Semptra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34 at [22], [27] and [46], [2007] 3 WLR 354 at [22], [27] and [46] per Lord Hope of Craighead. Lord Walker of Gestingthorpe discussed the foundations of unjust enrichment in *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49 at [150]-[158], [2007] 1 AC 558 at [150]-[158],

[2007] 1 All ER 449 at [150]-[158]. See generally Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 5 et seq.

<sup>7</sup> See eg *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 232-233, [1998] 1 All ER 737 at 745-746, HL, per Lord Hoffmann.

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## 2. Terminology.

One consequence of the late recognition of an independent law of restitution is that great care must be taken when analysing cases decided prior to that recognition taking place in 1991<sup>1</sup>. For example, many of the old cases use the language of implied contracts<sup>2</sup>, but such language would not be used by a court today<sup>3</sup>. This does not necessarily mean that these cases would now be decided differently<sup>4</sup> but it does require a translation of the reasoning of the court into a modern form. The language of the modern law of restitution must therefore be superimposed upon the language of the old forms of action and the now rejected implied contract theory. This will take time. For a while the result is likely to be a certain duality of language in the courts<sup>5</sup>. More difficult is the question whether or not the old forms of action<sup>6</sup> will continue to dictate the shape of the modern law of restitution. For example, the forms of action distinguish clearly between money claims and non-money claims<sup>7</sup>. This distinction obviously has validity when deciding whether or not a defendant has been enriched<sup>8</sup>, but its relevance to the ground on which restitution is ordered is not immediately apparent<sup>9</sup>. Notwithstanding the logical and analytical force of the argument in favour of unifying the grounds of restitution as they apply to money and non-money claims, it cannot be said that the courts have shown any willingness to undertake such a fundamental re-examination of the analytical foundations of the law of restitution. However, that may change as the law of restitution remains a developing field of law<sup>10</sup>.

<sup>1</sup> See *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; and PARAS 1 ante, 145 post.

<sup>2</sup> See eg *Sinclair v Brougham* [1914] AC 398, HL; *Holt v Markham* [1923] 1 KB 504 at 513, CA, per Scrutton LJ; *Morgan v Ashcroft* [1938] 1 KB 49 at 62, [1937] 3 All ER 92 at 96, CA, per Lord Greene MR (but see at 74-77 and 103-105 per Scott LJ); *Transvaal and Delagoa Bay Investment Co Ltd v Atkinson* [1944] 1 All ER 579 at 584 per Atkinson J; *Re Diplock, Diplock v Wintle* [1947] Ch 716 at 724, [1947] 1 All ER 522 at 527-528 per Wynn-Parry J (revsd on other grounds [1948] Ch 465 at 480-481, [1948] 2 All ER 318 at 326, CA, per Lord Greene MR) (no opinion on this point was expressed when the decision of the Court of Appeal in *Re Diplock, Diplock v Wintle* supra was affirmed sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL).

<sup>3</sup> Under the implied contract theory, the courts treated the alleged promise to pay as purely fictitious. The 'promise' or obligation was imposed by implication of law, quite apart from and without regard to the probable intention of the parties, and sometimes even in opposition to their expressed or presumed intention.

'If a man so wronged was to recover the money in the hands of the wrongdoer, and it was obviously just that he should be able to do so, it was necessary to create a fictitious contract: for there was no action possible other than debt or assumpsit on the one side and action for damages for tort on the other . . . The law, in order to do justice, imputed to the wrongdoer a promise which alone as forms of action then existed could give the injured person a reasonable remedy . . . These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights': *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 27-29, [1940] 4 All ER 20 at 35-37, HL, per Lord Atkin.

<sup>4</sup> Although it may do: see eg *Sinclair v Brougham* [1914] AC 398, HL, which was overruled by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL. The demise of the implied contract theory was an important factor in persuading their Lordships to overrule *Sinclair v Brougham* supra.

5 See eg *Boscawen v Bajwa* [1995] 4 All ER 769 at 776, [1996] 1 WLR 328 at 334, CA, per Millett LJ. Contrast Millett 'Restitution and Constructive Trusts' in Cornish, Nolan, O'Sullivan and Virgo (Eds) *Restitution Past, Present and Future* (1998) at pp 207-208: 'On the matter of language I have changed my mind . . . Bench and Bar must master the new vocabulary'.

6 See further PARA 4 et seq post.

7 Eg where the claimant has performed a service for the defendant or given goods to the defendant.

8 See further PARAS 11-17 post.

9 Thus academic commentators have argued that the distinction between a money and a non-money claim should not be relevant to the reason for restitution: see eg Burrows 'Free Acceptance and the Law of Restitution' (1988) 104 LQR 576 at 598.

10 See *Alf Vaughan & Co Ltd (in administrative receivership) v Royscot Trust plc* [1999] 1 All ER (Comm) 856, 861. See also *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 723, [1996] 2 All ER 961 at 1004, HL, per Lord Woolf ('Restitution is an area of the law which is still in the process of being evolved by the courts. In relation to restitution there are still questions remaining to be authoritatively decided').

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### 3. Common law and equity.

In terms of the development of the law of restitution, the distinction between common law claims and claims in equity was one of considerable importance. The two developed separately. The common law developed particular forms of action<sup>1</sup>, such as the action for money had and received. These actions became well-known and their limits reasonably well-established. They formed the core of what was then known as the law of quasi-contract. The influence of equity was perhaps rather more sporadic. Nevertheless it has played an influential role in the development of certain parts of the law of restitution. Particularly important have been the tracing rules in equity<sup>2</sup>, the constructive trust<sup>3</sup>, claims to recover profits made as a result of the commission of an equitable wrong<sup>4</sup> and the relief granted in equity to victims of undue influence<sup>5</sup>, to people who have entered into unconscionable bargains<sup>6</sup> and to individuals who have parted with money or property as the result of a mistake<sup>7</sup>.

Common law rules and equitable rules have developed separately. Thus, for example, the tracing rules at common law and in equity have had different requirements<sup>8</sup>. Equitable wrongs seem to have been more amenable to the award of gain-based damages than have common law wrongs. However, the continuation of these two separate streams of authority is unlikely. There are signs of a greater willingness on the part of the judiciary to attempt to integrate the two streams into one unified, coherent rule wherever possible. This trend has been particularly noticeable in relation to the rules which govern the process of tracing<sup>9</sup> and may develop beyond tracing and so bring about a much greater fusion of law and equity.

1 See further PARA 4 et seq post.

2 See further EQUITY vol 16(2) (Reissue) PARAS 861-866.

3 As to constructive trusts see further TRUSTS vol 48 (2007 Reissue) PARA 687 et seq.

4 See further PARA 150 et seq post.

5 See further PARA 52 et seq post.

6 See further PARA 57 post.

7 See further PARA 28 et seq post. As to mistake generally see MISTAKE.

8 See EQUITY vol 16(2) (Reissue) PARAS 861-866.

9 See eg *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 581, [1992] 4 All ER 512 at 534, HL, per Lord Goff of Chieveley; *Trustee of the Property of FC Jones & Sons (a firm) v Jones* [1997] Ch 159 at 169-170, [1996] 4 All ER 721 at 729, CA, per Millett LJ. See also Millett 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 409.

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## **(2) HISTORICAL DEVELOPMENT**

### **4. Writ of assumpsit.**

The common law source of many of the rules which today make up the law of restitution is to be found in the writ of indebitatus assumpsit. The action of assumpsit, though tortious in origin, had by the early seventeenth century become the regular remedy for breaches of contract<sup>1</sup>. The action was in two forms: (1) special assumpsit, where there was an express promise made<sup>2</sup>; and (2) indebitatus assumpsit, where the promise was implied from the previous debt<sup>3</sup>. It was from the latter action that the law of restitution developed. A number of distinct actions emerged and these have had considerable influence on the development of the law of restitution<sup>4</sup>.

1 For more detailed treatment see Baker *An Introduction to English Legal History* (4th Edn, 2002) Ch 19; Baker 'The History of Quasi-Contract in English Law' in Cornish, Nolan, O'Sullivan and Virgo (Eds) *Restitution Past, Present and Future* (1998) Ch 3.

2 See eg *Andrew v Boughey* (1552) 1 Dyer 75a.

3 See eg *Slade's Case* (1602) 4 Co Rep 91a at 92b.

4 See PARA 5 et seq post. In addition to the actions discussed in the following paragraphs there were also accounts for goods sold and delivered, money lent and account stated.

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### **5. Money had and received.**

An action for money had and received is an action used by claimants who are, for example, seeking to recover from the defendant money which has been paid to the defendant: (1) by mistake; (2) upon a consideration which has totally failed; (3) as a result of imposition, extortion or oppression; or (4) as the result of an undue advantage which has been taken of the claimant's situation, contrary to the laws made for the protection of persons under those circumstances<sup>1</sup>. Money had and received has proved to be perhaps the most influential of all the restitutionary claims, being the most flexible and the most commonly used. As framed, it only applies to claims to recover money paid by the claimant to the defendant<sup>2</sup>. The scope of the law of restitution is not, however, defined by the action for money had and received; there are restitutionary claims which do not fall within the province of the action<sup>3</sup> and, equally, there are claims which do fall within the scope of the action which are not restitutionary in nature<sup>4</sup>. It

is only those claims which fall within the scope of the action for money had and received and which are founded upon the principle of unjust enrichment which fall within the scope of the law of restitution<sup>5</sup>.

1 These examples are listed by Lord Mansfield in *Moses v Macferlan* (1760) 2 Burr 1005 at 1012. The action is not of course confined to these situations. It can also apply in other contexts, such as an action to recover money which the defendant has acquired from the claimant as the result of the commission of a tort.

2 The distinction between money and non-money claims is not universally accepted in so far as it relates to the reason for restitution: see eg Burrows 'Free Acceptance and the Law of Restitution' (1988) 104 LQR 576.

3 Eg an action to recover upon a quantum meruit basis. As to quantum meruit see PARA 113 et seq post.

4 Eg the action for money had and received has been used to recover money as property: see Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 4.

5 See Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 4.

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## 6. Money paid.

Money paid is the appropriate action where the claim is one in respect of money paid to a third party rather than to the defendant himself. The reason why the claim is brought against the defendant rather than the third party is that the defendant has obtained a benefit as a result of the payment of money to the third party. This is most commonly the case where the money has been paid by the claimant to discharge a debt which the defendant owed to the third party<sup>1</sup>. The action has also been used in cases where the claimant has intervened in a situation of necessity; for example, to pay for the funeral of a person when the defendant was in law responsible for the burial of the body<sup>2</sup>. The money must have been paid to the third party at the request of the defendant<sup>3</sup>, although that request can be implied from the facts and circumstances of the case<sup>4</sup>.

1 See eg *Exall v Partridge* (1799) 8 Term Rep 308.

2 See eg *Jenkins v Tucker* (1788) 1 Hy Bl 90. See also the cases discussed in PARA 133 post.

3 A request, express or implied, is necessary in order to establish that the defendant was enriched by the payment.

4 See eg *Exall v Partridge* (1799) 8 Term Rep 308.

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## 7. Quantum meruit and quantum valebat.

Quantum meruit and quantum valebat claims are claims to recover reasonable remuneration for services rendered or for goods supplied<sup>1</sup>. The difficulty in accommodating these claims within indebitatus assumpsit<sup>2</sup> was the absence of a debt (in other words, a sum certain) at the time of contracting. Prior to the seventeenth century, the common law afforded no remedy where services were rendered or goods were delivered by one person to another in

circumstances which raised a presumption that they were to be paid for, but where no precise sum had been fixed by the parties<sup>3</sup>. The action of assumpsit was, however, extended to cover these situations through the implied undertaking to pay a reasonable sum, for example where the law imposed an obligation to supply goods or services on a person by virtue of his status, and that obligation was discharged without a price being fixed<sup>4</sup>. From this development it was a short step to extending the action to the situation where a person, though not bound in law to provide goods or services, did in fact provide them without any express agreement as to price<sup>5</sup>. Towards the end of the seventeenth century quantum meruit was confined to work done and quantum valebat was used for goods supplied<sup>6</sup> but the practical significance of the distinction has disappeared in modern times and both actions are commonly referred to by the label quantum meruit.

1 As to quantum meruit and quantum valebat see PARA 113 et seq post.

2 See PARA 4 ante.

3 Debt would not lie in the absence of a previously ascertained price: *Young v Ashburnsham* (1587) 3 Leon 161.

4 See eg *Warbrooke v Griffin* (1609) 2 Brownl 254 (innkeeper); *Rogers v Head* (1610) Cro Jac 262 (common carrier).

5 See eg *Six Carpenters' Case* (1610) 8 Co Rep 146a at 147a; *Hall v Hemminge* (1616) 3 Bulst 85; *Hall v Walland* (1621) Cro Jac 618; *Rolfe v Sharp* (1627) Cro Car 77, Ex Ch.

6 See *Boulton v Harris* (1676) 3 Keb 469; *Web v Moore* (1691) 2 Vent 279.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(2) HISTORICAL DEVELOPMENT/8. The different senses in which the term 'quantum meruit' is used.

## 8. The different senses in which the term 'quantum meruit' is used.

The term 'quantum meruit' is used in different senses at common law<sup>1</sup>. For example, in some cases quantum meruit is used to express the measure of recovery in a contractual claim<sup>2</sup>. In other cases it is used to denote a restitutionary claim<sup>3</sup>. The claim is clearly contractual in nature where it is one to recover a reasonable price or remuneration in a contract where no price or remuneration has been fixed for goods sold or work done<sup>4</sup>. Where, however, no contract is ever concluded between the parties<sup>5</sup> or the contract is void or otherwise unenforceable<sup>6</sup>, the claim cannot be contractual in nature and is likely to be restitutionary. In other cases it can be difficult to discern whether the claim is contractual in nature or restitutionary. Where the implication of an obligation to pay a reasonable sum is a genuine one on the facts, reflecting the intention of the parties, the claim is contractual, but where the obligation is imposed as a matter of law, the claim is more likely to be restitutionary<sup>7</sup>.

1 As to quantum meruit see PARAS 7 ante, 113 et seq post. See also Winfield *The Province of the Law of Tort* (1931) pp 157-160.

2 See eg *Foley v Classique Coaches Ltd* [1934] 2 KB 1, CA.

3 See eg *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712, [1957] 1 WLR 932.

4 See eg the Sale of Goods Act 1979 s 8(2) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 56); and the Supply of Goods and Services Act 1982 s 15(1) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 99).

<sup>5</sup> See eg *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, [1982] 1 FTLR 222.

<sup>6</sup> See eg *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, Aust HC.

<sup>7</sup> See eg *Way v Latilla* [1937] 3 All ER 759, 81 Sol Jo 786, HL (a case in which it is not easy to discern whether the court decided that the claim was contractual or restitutionary).

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## **9. The modern significance of the forms of action.**

The recognition of an independent law of restitution based on the principle that unjust enrichments should be reversed throws into question the relevance of the old forms of action. While it is customary practice to continue to plead the old forms of action, it should no longer be necessary to do so. All that is required is to state the nature of the claim and the facts on which the claimant relies<sup>1</sup> and that can be done without resort to the old forms of action. It should suffice for the claimant to assert that the defendant has been unjustly enriched at his expense. The claimant is also required to specify the remedy which he seeks<sup>2</sup>, and that will usually be an order for the payment of a sum of money by the defendant to the claimant which will have the effect of reversing the unjust enrichment.

<sup>1</sup> As to the contents of the claim form see CPR 16.2. As to the contents of the particulars of claim see CPR 16.4. There is nothing in *Practice Direction--Statements of Case* PD 16 which requires reference to be made to the old forms of action. See further CIVIL PROCEDURE vol 11 (2009) PARA 584 et seq.

<sup>2</sup> See CPR 16.2(b).

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## **(3) THE STRUCTURE OF THE MODERN LAW**

### **10. The structure of a restitutionary claim.**

It is now generally accepted<sup>1</sup> that there are four stages to any restitutionary claim: (1) the defendant must have been enriched; (2) the enrichment must have been at the expense of the claimant; (3) that enrichment must have been unjust; and (4) consideration must be given to any applicable defences<sup>2</sup>. The claimant must satisfy the court that the first three elements of the claim have been satisfied<sup>3</sup>. All three must be satisfied before a restitutionary claim can succeed. The fourth stage, the defences, is likely to assume ever increasing significance in the cases. As the courts slowly expand the grounds on which restitution can be ordered<sup>4</sup>, it will fall to the defences to keep liability within acceptable bounds. In addition to these four stages it has been argued that there is a fifth stage to the inquiry, namely the remedies which are available to the claimant<sup>5</sup>.

<sup>1</sup> Evidence of this acceptance is clearer in academic writings (see eg Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 16; Virgo *The Principles of the Law of Restitution* (2nd Edn, 2006); Burrows *The Law of*

*Restitution* (2nd Edn, 2002); and Birks *An Introduction to the Law of Restitution* (1985)) than in the judgments of the courts, but there are signs of a greater willingness on the part of the courts to develop a more consistent analytical approach which places emphasis on the different stages of a restitutionary claim (see eg *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227, [1998] 1 All ER 737 at 740, HL, per Lord Steyn; *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] QB 110 at 123-124, [1999] 1 All ER (Comm) 8 at 18-19, CA, per Waller LJ; *Cressman v Coys of Kensington* [2004] EWCA Civ 47 at [22], [2004] 1 WLR 2775 at [22] per Mance LJ; *R (on the application of Rowe) v Vale of White Horse District Council* [2003] EWHC 388 (Admin) at [11], [2003] 1 Lloyd's Rep 418 at [11] per Lightman J).

2 As to defences see PARA 165 et seq post. As to the relationship between the law of restitution and the law of contract, the law of tort and the law of property see PARAS 24-26 post.

3 There is no free-standing claim of unjust enrichment; a claimant still has to establish that his claim comes within one of the existing categories of unjust enrichment, or a justifiable extension of one: *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch), (2005) Times, 17 November, [2005] All ER (D) 146 (Nov).

4 See PARAS 20-21 post.

5 Millett 'Restitution and Constructive Trusts' in Cornish, Nolan, O'Sullivan and Virgo (Eds) *Restitution: Past, Present and Future* (1998) pp 199, 208, cited to the Court of Appeal in *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] QB 110 at 123, [1999] 1 All ER (Comm) 8 at 18, CA, per Waller LJ.

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## 11. Enrichment.

A restitutionary claim can only be brought where the defendant has been enriched as a result of something which the claimant has done for or given to him<sup>1</sup>. The absence of an enrichment is fatal to the existence of a restitutionary claim. Yet cases can be found in which judges have used the word 'restitution' to describe a situation in which there is a loss to the claimant but no corresponding gain made by the defendant<sup>2</sup>. Restitution is used in this sense to denote the restoration of the claimant to his previous position by making good the loss which he has suffered<sup>3</sup>. While there is no doubt that, in ordinary usage and in general legal discourse, the word 'restitution' is capable of bearing this meaning<sup>4</sup>, cases in which there is a loss to the claimant but no gain to the defendant do not belong within the scope of the law of restitution if the latter is defined, in the way in which the courts have defined it<sup>5</sup>, as that part of the law which is concerned with reversing a defendant's unjust enrichment at the claimant's expense<sup>6</sup>.

An enrichment may be either positive (the receipt of money or goods) or negative (the saving of a necessary expenditure)<sup>7</sup>. Thus far the courts have tended to approach the question whether or not the defendant has been enriched in an intuitive or impressionistic manner<sup>8</sup>. This is in marked contrast to academic analysis of the enrichment issue<sup>9</sup>, which has developed in a much more systematic, but complex, fashion. The courts have begun to employ some of the language found in academic writings<sup>10</sup> albeit rather hesitantly. It remains to be seen whether or not the courts will make greater use of the more analytically rigorous approach to be found in some academic writing<sup>11</sup>. The need for a more analytical approach arises in the case where the enrichment is alleged to take the form of goods or services. Where the enrichment takes the form of money, the difficulties which arise are relatively few.

1 *Foskett v McKeown* [2001] 1 AC 102 at 125, [2000] 3 All ER 97 at 118, HL, per Lord Hope of Craighead, and at 129 and 121 per Lord Millett.

2 See eg *Swindle v Harrison* [1997] 4 All ER 705 at 713-714, CA, per Evans LJ, and at 733 per Mummery LJ.

3 See eg *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 81-82, [1999] 4 All ER 961 at 977, HL, per Lord Steyn, and at 104-105 and 997-998 per Lord Clyde.

4 'The expression 'restitution' and its derivatives have different shades of meaning. In some contexts (and in particular in the traditional Latin phrase *restitutio in integrum*) it may be indistinguishable from compensation; restitutionary damages, as a term of art, must however be sharply distinguished from compensatory damages (see generally *A-G v Blake* [1998] Ch 439 at 456-459, [1998] 1 All ER 833, CA, and the wealth of academic work there referred to); and sometimes a restitutionary remedy (such as an account of profits) is an alternative to damages of any sort, and the plaintiff must elect between them . . .': *Porter v Magill* (1999) 31 HLR 823 at 895, CA, per Robert Walker LJ (revsd, not affecting this point, sub nom *Porter v Magill*, *Weeks v Magill* [2001] UKHL 67, [2002] 2 AC 357).

5 See eg *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL.

6 The confusion arises because restitution denotes a response rather than an event or a cause of action. The potential of the word 'restitution' to lead to confusion and error has led to a call for the subject to be titled the law of unjust enrichment rather than the law of restitution: see Birks 'Misnomer' in Cornish, Nolan, O'Sullivan and Virgo (Eds) *Restitution: Past, Present and Future* (1998) p 1; Birks *Unjust Enrichment* (2nd Edn, 2005) Chs 1, 2.

7 Examples can be found of judicial reluctance to regard the saving of an expense as a benefit: see eg *Phillips v Homfray* (1883) 24 ChD 439 at 454-455, CA, per Bowen LJ. Where the saving is of a necessary expense there is no basis for a refusal to recognise that a benefit has been conferred. There are in fact many cases in which the saving of a necessary expense has been regarded as a benefit, most notably in cases concerned with the discharge of another's debt: see eg para 16 note 4 post. It is submitted that the proposition that the saving of a necessary expense cannot constitute a benefit therefore cannot be supported.

8 See eg *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA.

9 See eg Burrows *The Law of Restitution* (2nd Edn, 2002) pp 7-16; Beatson *The Use and Abuse of Unjust Enrichment* (1991) Ch 2.

10 Thus 'incontrovertible benefit' has begun to find its way into the language of the courts. As to incontrovertible benefit see PARA 16 post.

11 See *Cressman v Coys of Kensington* [2004] EWCA Civ 47 at [26]-[40], [2004] 1 WLR 2775 at [26]-[40] per Mance LJ.

## UPDATE

### 11 Enrichment

NOTE 6--See Case C-47/07P *Masdar (UK) Ltd v EC Commission* [2009] 2 CMLR 1, [2008] All ER (D) 166 (Dec), ECJ.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(3) THE STRUCTURE OF THE MODERN LAW/12. Money.

### 12. Money.

Where the defendant has received money from the claimant, there is no difficulty in establishing that the defendant was enriched<sup>1</sup> because money is a 'universal medium of exchange'<sup>2</sup>. Where the money has been paid not to the defendant but to a third party, it is generally necessary to show that the money has been paid at the request, express or implied, of the defendant in order to establish that the payment has resulted in a benefit to the defendant rather than the third party<sup>3</sup>.

1 Where, at the time at which the claim is brought, the defendant is no longer enriched, he may have available to him the defence of change of position: see PARAS 166-169 post.

2 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 937, [1979] 1 WLR 783 at 799 per Robert Goff J.

3 Where it can be demonstrated that the defendant has been incontrovertibly benefited, it is not necessary to prove that there has been a request. As to incontrovertible benefit see PARA 16 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(3) THE STRUCTURE OF THE MODERN LAW/13. Non-money benefits and 'subjective devaluation'.

### 13. Non-money benefits and 'subjective devaluation'.

It is harder to establish whether the defendant has been enriched where the enrichment is alleged to take the form of goods or services<sup>1</sup>. Where the claimant performs a service for the defendant or transfers to the defendant land or chattels, the mere fact that work has been done or that goods or land have been transferred to the defendant does not necessarily suffice, of itself, to prove that the defendant has been enriched; the defendant may be able to 'subjectively devalue'<sup>2</sup>. That is to say, while the claimant does not have to establish that the defendant subjectively regarded the alleged enrichment as a benefit, the claimant must show that the defendant has objectively been benefited, but it is then open to the defendant to show that he does not regard that objective benefit as a benefit<sup>3</sup>. To the extent that the law of restitution allows a defendant to appeal to his or own sense of what constitutes a benefit, it can be said that the law of restitution adopts a subjective definition of value. More accurately perhaps, it can be said that the law allows a defendant subjectively to devalue what is otherwise an objective benefit<sup>4</sup>. In this way the law respects the right of a defendant to choose what is or is not of value<sup>5</sup>.

1 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 937, [1979] 1 WLR 783 at 799 per Robert Goff J. The difficulty arises from the fact that services, by their nature, cannot be restored; the same is true, in many cases, of the provision of goods (where, for example, they have been consumed or transferred to a third party).

2 Birks *An Introduction to the Law of Restitution* (1985) pp 109-114. The fact that a defendant can 'subjectively devalue' was recognised by Hoffmann LJ in *Ministry of Defence v Ashman* (1993) 66 P & CR 195 at 201, CA. See also *Cressman v Coys of Kensington* [2004] EWCA Civ 47 at [28], [2004] 1 WLR 2775 at [28] per Mance LJ; *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34 at [119], [2007] 3 WLR 354 at [119] per Lord Nicholls of Birkenhead and at [232] per Lord Mance; *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2004] EWHC 2603 (Comm) at [447] per Cresswell J. The phrase was also used, albeit in a different context, in *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 112, [1999] 4 All ER 961 at 1004, HL, per Lord Millett.

3 See eg Birks 'In Defence of Free Acceptance' in Burrows (Ed) *Essays on the Law of Restitution* (1991) pp 128-130.

4 A good example of this (although it does not use the language of subjective devaluation) is *Boulton v Jones* (1857) 2 H & N 564.

5 'Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will': *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234 at 248, CA, per Bowen LJ. See to similar effect *Taylor v Laird* (1856) 25 LJ Ex 329 at 332 per Pollock CB. A defendant who has been incontrovertibly benefited cannot resort to subjective devaluation: see PARA 16 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(3) THE STRUCTURE OF THE MODERN LAW/14. Request for goods or services.

#### 14. Request for goods or services.

Where the defendant has requested or asked the claimant to carry out the work or to provide the goods or services, the defendant generally cannot resort to subjective devaluation and will be required to pay for the goods according to the terms of the request or, in the absence of any price stipulated in the request, at a reasonable rate<sup>1</sup>. In many cases the existence of a request, together with work done or goods supplied in compliance with the terms of the request, will lead to the inference that a contract has been concluded between the parties and that contract will then govern the relationship between the parties<sup>2</sup>. However, where the 'contract' between the parties is void or unenforceable, any obligation to pay for the work done or goods supplied under the 'contract' cannot be attributed to the law of contract and must be found, if at all, in the law of restitution<sup>3</sup>. Similarly, where the defendant has requested the claimant to carry out some work but the parties have failed to reach agreement on the terms on which the work is to be done, a court may conclude that the parties have not formed a contract and that the obligation of the defendant to pay for the work done is to be found in the law of restitution<sup>4</sup>. A defendant who has requested the work to be done is enriched notwithstanding the fact that the service has not resulted in an end product in the hands of the defendant<sup>5</sup>.

To the extent that the claimant fails to carry out the work in accordance with the terms of the request or provides goods which do not correspond with the terms of the request<sup>6</sup>, the value to the defendant of the enrichment will be reduced. Similarly, where the claimant fails to complete performance of the work, the defendant may be able to deny liability to pay altogether<sup>7</sup> or may be able to reduce the amount of the enrichment. On the other hand, where the defendant wrongfully prevents the claimant from completing performance, the defendant may be required to pay the reasonable value of the work done, even though the work done is only a part of what was requested<sup>8</sup>.

1 See eg *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, [1982] 1 FTLR 222.

2 See eg *Ellis v Hamlen* (1810) 3 Taunt 52; *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523.

3 See eg *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, Aust HC.

4 See eg *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, [1982] 1 FTLR 222.

5 Contrast *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 939, [1979] 1 WLR 783 at 802, where Robert Goff J held that the Law Reform (Frustrated Contracts) Act 1943 s 1(3) required him to hold 'in an appropriate case' that it was the end-product of the claimant's services which was to be regarded as the benefit. Had the matter not been governed by statute it is clear that Robert Goff J would have concluded that it was the services themselves which constituted the benefit and, indeed, he stated that it would have been preferable if Parliament when enacting the Act had recognised that the services themselves were to be regarded as the benefit: *BP Exploration Co (Libya) Ltd v Hunt (No 2)* supra at 802. Cf Beatson *The Use and Abuse of Unjust Enrichment* (1991) p 21.

6 See eg *Crown House Engineering Ltd v Amec Projects Ltd* (1990) 48 BLR 32 at 54, CA, per Slade LJ, and at 57 per Bingham LJ. The defendants in *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, [1982] 1 FTLR 222 alleged that the work had been done defectively but that claim was dismissed on the facts.

7 See eg *Sumpter v Hedges* [1898] 1 QB 673, CA.

8 *Planché v Colburn* (1831) 8 Bing 14.

## 15. Free acceptance.

A defendant who 'freely accepts' goods or services may be held to have been enriched thereby. A 'free acceptance' has been stated to occur where 'a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept'<sup>1</sup> so that 'when a defendant has passed up an opportunity to reject a benefit knowing that it was not offered gratuitously he has only himself to blame for the resulting situation'<sup>2</sup>. While free acceptance might constitute the 'most satisfactory explanation of those decisions which recognised the [claimant's] claim that his services, which had not been requested, had benefited the defendant'<sup>3</sup>, its foundation in the case law is presently insecure<sup>4</sup> and it has been challenged both on the ground that it is not recognised in the case law and on the ground that it is inconsistent with principle<sup>5</sup>. Although a defendant is not generally required to inform a claimant that he does not wish to receive and pay for a particular service or good<sup>6</sup>, there may come a point where the conduct of the defendant in hanging back while the claimant carries out the work in the belief that he will be paid for it is so unconscionable that a court will conclude that the defendant is unable subjectively to devalue<sup>7</sup>.

1 Birks *An Introduction to the Law of Restitution* (1985) p 265.

2 Birks *An Introduction to the Law of Restitution* (1985) p 114. See also *Cressman v Coys of Kensington* [2004] EWCA Civ 47, [2004] 1 WLR 2775.

3 Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 21. See, however, *R (on the application of Rowe) v Vale of White Horse District Council* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418 (council supplied sewerage services for six years without indicating that these were not covered by the council rates and water rates paid by tenants; the council then sought to recover the arrears; held that the failure of the council to indicate that the services were being supplied prevented the claimant from 'freely accepting' those services as he had no opportunity to reject them).

4 Dicta in *Leigh v Dickeson* (1884) 15 QBD 60 at 64-65, CA, per Brett MR, *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234 at 249 and at 251, CA, per Bowen LJ, and *Re Cleadon Trust Ltd* [1939] Ch 286 at 299-300, CA, per Greene MR, have been relied on in order to establish the claim that the existence of free acceptance has been recognised in English law (see Birks 'In Defence of Free Acceptance' in Burrows (Ed) *Essays on the Law of Restitution* (1991) pp 105-109). Other cases which may be explained in terms of free acceptance include: *Lamb v Buncie* (1815) 4 M & S 275; *Weatherby v Banham* (1832) 5 C & P 228; *Paynter v Williams* (1833) 1 Cr & M 810; *Alexander v Vane* (1836) 1 M & W 511. Free acceptance has received some judicial recognition in New Zealand: see *Van den Berg v Giles* [1979] 2 NZLR 111 at 120 per Jeffries J. Reference was made to free acceptance in *R (on the application of Rowe) v Vale of White Horse District Council* [2003] EWHC 388 (Admin) at [12], [2003] 1 Lloyd's Rep 418 at [12] per Lightman J and in *Cressman v Coys of Kensington* [2004] EWCA Civ 47 at [28]-[32], [2004] 1 WLR 2775 at [28]-[32] per Mance LJ, but in neither case did the court deal exhaustively with the issue (although in *Cressman v Coys of Kensington* supra Mance LJ did draw attention to the difference of view between Birks and Burrows but did not find it necessary to resolve the issue).

5 See eg Burrows *The Law of Restitution* (2nd Edn, 2002) pp 20-23. Contrast Virgo *The Principles of the Law of Restitution* (2nd Edn, 2006) pp 87-88, where it is argued that free acceptance is a form of estoppel which operates to prevent a defendant from asserting that he did not value an objective benefit which he has received.

6 See eg *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234 at 248, CA, per Bowen LJ; *Taylor v Laird* (1856) 25 LJ Ex 329 at 332 per Pollock CB.

7 See eg Burrows *The Law of Restitution* (2nd Edn, 2002) pp 23-24. However, as Burrows concedes, the authorities have not yet addressed this issue specifically. See also Virgo *The Principles of the Law of Restitution* (2nd Edn, 2006) pp 90-93, where it is argued that a defendant may be estopped by his conduct from denying that he has been enriched. As to subjective devaluation see PARA 13 ante.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(3) THE STRUCTURE OF THE MODERN LAW/16. Incontrovertible benefit.

## 16. Incontrovertible benefit.

A defendant may be enriched by the receipt of goods or services even where he has not requested, bargained for or freely accepted them. In such cases the defendant is said to have been incontrovertibly benefited<sup>1</sup>. An incontrovertible benefit is 'an unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture'<sup>2</sup>. It may take either a negative or a positive form.

Negatively, a defendant is incontrovertibly benefited when he is saved a necessary expense<sup>3</sup>. The expense may be either legally or factually necessary. It is legally necessary where the defendant was compellable by law to pay the sum in question, for example a debt owed by the defendant which has been discharged by the payment made by the claimant<sup>4</sup>. Expenditure which is factually necessary might include sums spent on the purchase of 'necessaries' for a person who lacks the capacity to enter into a contract to purchase them<sup>5</sup>. In deciding whether or not an expenditure is factually necessary, courts will disregard 'unrealistic or fanciful possibilities of [the defendant] doing without it'<sup>6</sup>. So, for example, a company cannot avoid paying for the services of a person who performed the role of a managing director by maintaining that it was not necessary for it to employ a managing director<sup>7</sup>.

An incontrovertible benefit may take a positive form where the defendant obtains a financial benefit which he has realised<sup>8</sup> or, possibly, which is readily realisable<sup>9</sup>. Where the defendant has realised the benefit by turning it into money there is generally no difficulty in concluding that the defendant has been incontrovertibly benefited because money is a 'universal medium of exchange'<sup>10</sup>. Where, however, the defendant has not realised the benefit (for example, the claimant has mistakenly improved the defendant's chattel but the defendant has not sold the chattel) the court must consider whether or not it is prepared to require the defendant, if necessary, to sell the benefit in order to make restitution to the claimant. Where the asset is a chattel, the court may be prepared to conclude that the benefit is readily realisable<sup>11</sup>, but may not be prepared to do so where the chattel is unique<sup>12</sup>. The fact that a defendant has been incontrovertibly benefited merely establishes that he has been enriched; it does not of itself establish that he has been unjustly enriched<sup>13</sup>.

1 The phrase was coined by academic writers and has begun to find its way into the language of the courts: see eg *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co, The Manila* [1988] 3 All ER 843 at 855 per Hirst J; *Marston Construction Co Ltd v Kigass Ltd* (1989) 46 BLR 109 at 125 per Judge Bowsher QC; *Monks v Poynice Pty Ltd* (1987) 11 ACLR 637 at 639-640 per Young J; *J Gadsden Pty Ltd v Strider 1 Ltd, The AES Express* (1990) 20 NSWLR 57 at 70 per Carruthers J; *Regional Municipality of Peel v Canada* (1993) 98 DLR (4th) 140 at 158-160 per McLachlin J; *Cressman v Coys of Kensington* [2004] EWCA Civ 47 at [33]-[40], [2004] 1 WLR 2775 at [33]-[40] per Mance LJ; *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] CLC 324. Although the language of incontrovertible benefit has not been used in many cases it can nevertheless provide the explanation for a number of cases (see Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 24-28).

2 *Regional Municipality of Peel v Canada* (1993) 98 DLR (4th) 140 at 159 per McLachlin J. See also *Cressman v Coys of Kensington* [2004] EWCA Civ 47 at [33], [2004] 1 WLR 2775 at [33] per Mance LJ.

3 See eg *Regional Municipality of Peel v Canada* (1993) 98 DLR (4th) 140.

4 See eg *Exall v Partridge* (1799) 8 Term Rep 308 (where the defendant owed a debt to a third party who was paid by the claimant and the effect of the payment was to discharge the debt); *Corp v the County of Carleton v Corp of the City of Ottawa* [1965] SCR 663. The fact that the defendant was 'morally obliged' to make the payment will probably not satisfy the necessity test: see *Regional Municipality of Peel v Canada* (1993) 98 DLR (4th) 140.

5 See eg *Re Rhodes* (1890) 44 ChD 94, CA.

6 Birks *An Introduction to the Law of Restitution* (1985) p 120, cited with approval in *Monks v Poynice Pty Ltd* (1987) 11 ACLR 637 at 640 per Young J.

7 *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066, CA (where the defendant company was required to pay the claimant the reasonable value of the services which he had performed for the company; the 'contract' under which he had been employed as managing director of the company was, unknown to him, void).

8 Birks *An Introduction to the Law of Restitution* (1985) pp 121-124. Provided that the defendant has realised the benefit before the time of the court proceedings this should suffice to establish the existence of an incontrovertible benefit. Thus in *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA, there was an incontrovertible benefit because the owner had sold the car by the time of the interpleader. In *Cressman v Coys of Kensington* [2004] EWCA Civ 47, [2004] 1 WLR 2775, despite the defendant claiming he had no interest in the benefit, the court inferred otherwise.

9 Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 25. The proposition that a benefit may be realisable and need not be realised was accepted in *Marston Construction Co Ltd v Kigass Ltd* (1989) 46 BLR 109 at 125-126 per Judge Bowsher QC. For a mid-position, according to which it suffices that the court regards it as 'reasonably certain that [the defendant] will realise the positive benefit' see Burrows *The Law of Restitution* (2nd Edn, 2002) p 19. See also *Cressman v Coys of Kensington* [2004] EWCA Civ 47 at [37], [2004] 1 WLR 2775 at [37] per Mance LJ, where a suggestion was made that a distinct category of enrichment should be recognised where a benefit was readily returnable.

10 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 937, [1979] 1 WLR 783 at 799 per Robert Goff J.

11 See eg Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 246. In *Greenwood v Bennett* [1973] QB 195 at 202, CA, Lord Denning stated (obiter) that, in his view, a mistaken improver of a chattel has a direct right of action against the owner of the chattel for the improvements which have been made to the chattel. The statement was not shared by the other members of the Court of Appeal. Nor did Lord Denning seek to work out the basis on which it could be said that the owner had been enriched. One possible basis is, however, incontrovertible benefit (see McKendrick 'Restitution and the Misuse of Chattels -- The Need for a Principled Approach' in Palmer and McKendrick (Eds) *Interests in Goods* (2nd Edn, 1998) pp 902-904). An improver is given what amounts to a passive restitutionary claim by the Torts (Interference with Goods) Act 1977 s 6(1): see TORT vol 45(2) (Reissue) PARA 623.

12 Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 246.

13 It has been suggested that incontrovertible benefit, of itself, establishes that a defendant has been unjustly enriched: see eg *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co, The Manila* [1988] 3 All ER 843 at 855. However, it is submitted that incontrovertible benefit only establishes that the defendant has been enriched; the claimant must then go on to prove that that enrichment was unjust: see McKendrick 'Incontrovertible benefit -- a postscript' [1989] LMCLQ 401.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(3) THE STRUCTURE OF THE MODERN LAW/17. Valuing the enrichment.

## 17. Valuing the enrichment.

The time at which the enrichment which the defendant has received is generally valued is the time at which it was received by the defendant<sup>1</sup>. Where the enrichment takes the form of a money payment made by the claimant valuation difficulties do not generally arise<sup>2</sup>. In the case of goods and services it is necessary first to identify the benefit before proceeding to value it. In the case of services, where the benefit takes the form of the end-product of the services, then that end-product must be valued<sup>3</sup>. On the other hand, where the benefit takes the form of the services themselves then it is the value of the services which must be valued<sup>4</sup>. In the latter case the services must generally be paid for by the defendant at the rate of the reasonable value for the services at the time at which they were rendered<sup>5</sup>. Where the benefit takes the form of goods, the value of the benefit will generally be the reasonable value of the goods<sup>6</sup>. However, where the defendant can show that the goods or services were worth less to him than their reasonable value then he may be able to subjectively devalue them<sup>7</sup>. In determining

the value of goods or services which have been provided or supplied under a contract which was or is ineffective, the court may have regard to the terms of the contract when valuing the benefit<sup>8</sup>. While the terms of the contract have evidential value, they are not conclusive, so that the contract price does not generally<sup>9</sup> act as a ceiling on the claimant's restitutionary claim<sup>10</sup>. The value of the benefit may be reduced where the goods supplied or services provided are defective in the sense that they do not correspond with the goods or services which the defendant requested<sup>11</sup>.

1 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 940-941, [1979] 1 WLR 783 at 802-803 per Robert Goff J. Where the benefit has declined in value since the time of receipt or been destroyed, this may be relevant to the defence of change of position (as to which see PARAS 166-169 post). As to interest see PARA 23 post.

2 See eg *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 940, [1979] 1 WLR 783 at 802 per Robert Goff J.

3 See eg *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712, [1957] 1 WLR 932.

4 However, where the gain which the defendant has made exceeds the loss which the claimant has suffered, valuation difficulties may arise when seeking to work out the extent to which the defendant is required to account to the claimant for the gain which has been made. Problems may also arise in relation to the valuation of foreign currency: see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 969-971, [1979] 1 WLR 783 at 839-841 per Robert Goff J.

5 An exception may be where the service takes the form of work done to the claimant's chattel. In such a case the value of the benefit may be the increase in the value of the chattel as a result of the work done and not the reasonable value of the services carried out. But contrast *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA, where the improver was held to be entitled to recover the value of the services rendered and not the increase in the value of the chattel which was the product of his work. No consideration was given by the Court of Appeal to any alternative approach to the valuation of the benefit received. For criticism of this aspect of the decision see Virgo *The Principles of the Law of Restitution* (2nd Edn, 2006) p 99.

6 See eg *Nash v Inman* [1908] 2 KB 1 at 12, CA, per Buckley LJ. See also the Sale of Goods Act 1979 s 3(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 37.

7 *Ministry of Defence v Ashman* (1993) 66 P & CR 195, CA; *Ministry of Defence v Thompson* [1993] 2 EGLR 107, CA. The location of the burden of proof is unclear, although it has been argued that the burden should be on the defendant (see Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 35-36). As to subjective devaluation para 13 ante.

8 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 943-945, [1979] 1 WLR 783 at 805-806 per Robert Goff J; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

9 There may, possibly, be cases where the contract price will act as a ceiling on the claimant's restitutionary claim: see eg *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 257, Aust HC, per Deane J. See also Burrows *The Law of Restitution* (2nd Edn, 2002) pp 345-346, where it is pointed out that the contract price ought to act as a ceiling on the restitutionary claim where the basis for the finding that the defendant was enriched is to be found in the fact that the defendant requested or bargained for the particular benefit.

10 See eg *Lodder v Slowey* [1904] AC 442, PC (affg *Slowey v Lodder* (1901) 20 NZLR 321 at 358, NZ CA, per Williams J); *Boomer v Muir* 24 P 2d 570 (1933); *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm), [2004] All ER (D) 341 (Nov). See also Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 516 et seq.

11 See eg *Crown House Engineering Ltd v Amec Projects Ltd* (1989) 48 BLR 32 at 54, CA, per Slade LJ, and at 57 per Bingham LJ.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(3) THE STRUCTURE OF THE MODERN LAW/18. 'At the expense of'.

## 18. 'At the expense of'.

The requirement that the claimant prove that the defendant has been enriched at the claimant's expense serves to identify the claimant as being the proper person to bring the claim<sup>1</sup> and also to identify the measure of that claim<sup>2</sup>. The fact that the claimant has subsequently 'passed on' the loss which he has suffered to a third party does not provide the defendant with a defence to the claimant's restitutionary claim<sup>3</sup>. Generally, the enrichment will be 'by subtraction' from the claimant; that is to say, the gain made by the defendant will correspond exactly with the loss suffered by the claimant<sup>4</sup>. Where, however, the defendant has been enriched as a result of a wrong which he has committed against the claimant, there need be no correlation between the gain to the defendant and the loss to the claimant<sup>5</sup> and, indeed, in most cases the gain which the defendant has made from the wrong exceeds the loss which the claimant has suffered<sup>6</sup>.

1 *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 at 125, [1979] 3 All ER 1025 at 1037 per Goulding J. In some cases it may be necessary for the claimant to embark on the exercise of tracing in order to establish that the defendant was enriched at his expense: see eg *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL. The House of Lords has affirmed that tracing is a process rather than a particular claim or remedy: see *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL. It therefore follows that there is nothing anomalous in the idea that the claimant may have to trace in order to bring a personal claim. For another example of tracing being used as a preliminary stage in a personal claim see *El Ajou v Dollar Land Holdings Ltd* [1993] 3 All ER 717, [1993] BCLC 735. See also *Re BHT (UK) Ltd* [2004] EWHC 201 (Ch), [2004] 1 BCLC 568. As to tracing see further PARA 26 note 2 post; and as to tracing in equity see EQUITY vol 16(2) (Reissue) PARAS 861-866.

2 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 237, [1998] 1 All ER 737 at 750, HL, per Lord Clyde.

3 *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380, [1996] 4 All ER 733, CA; *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 at 984-987 per Hobhouse J; *Comr of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51.

4 Eg the claimant pays £100 to the defendant under a mistake of fact. The defendant is £100 better off while the claimant is £100 worse off. The subtraction from the defendant is mirrored by the increase in the wealth of the claimant and serves to identify the value of the claim. The terminology of unjust enrichment by subtraction was employed in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 226, [1998] 1 All ER 737 at 740, HL, per Lord Steyn. As to interest see *Sempre Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34, [2007] 3 WLR 354; and PARA 23 post.

5 See eg *Halifax Building Society v Thomas* [1996] Ch 217, [1995] 4 All ER 673, CA; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 226, [1998] 1 All ER 737 at 740, HL, per Lord Steyn.

6 See eg *Boardman v Phipps* [1967] 2 AC 46, [1996] 3 All ER 721, HL.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(3) THE STRUCTURE OF THE MODERN LAW/19. Indirect enrichment.

## 19. Indirect enrichment.

Where the claimant has paid money to a third party and in doing so has discharged the defendant's liability to that third party, the defendant is nevertheless considered to have been enriched at the claimant's expense because the loss to the claimant as a result of the payment is matched by the gain which the defendant has made<sup>1</sup>. On the other hand, where the benefit has been conferred on the defendant indirectly via a third party, and not by the claimant directly, the claimant will not generally be able to establish that the defendant was enriched at his expense<sup>2</sup> unless: (1) the claim against the defendant is based on the claimant's proprietary rights in the particular property which was transferred from the third party to the defendant<sup>3</sup>; (2) the defendant obtained a benefit from a third party by usurping the claimant's office or position<sup>4</sup>; or (3) the third party was acting as the claimant's agent when conferring the benefit

on the defendant<sup>5</sup>. A buyer who obtains a benefit through the use of goods which belong to a third party (having been sold the goods by a seller who had no title to sell the goods) is not liable to the seller for any benefit which the buyer has obtained through the use of the goods prior to the setting aside of the contract of sale; in such a case the buyer has been enriched at the expense of the true owner of the goods, not the vendor<sup>6</sup>.

1 See eg *Exall v Partridge* (1799) 8 Term Rep 308; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL.

2 See eg *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84 at 85, PC. In such a case the defendant has been enriched at the expense of the third party, not the claimant. As to the doctrine of subrogation see EQUITY vol 16(2) (Reissue) PARAS 770-776.

3 See eg *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL.

4 See eg *Woodward v Ashton* (1676) 2 Mod Rep 95; *Arris and Arris v Stukely* (1677) 2 Mod Rep 260; *Howard v Wood* (1679) 2 Lev 245; *Jacob v Allen* (1703) 1 Salk 27; *Asher v Wallis* (1707) 11 Mod Rep 146; *Boyter v Dodsworth* (1796) 6 Term Rep 681; *King v Alston* (1848) 12 QB 971.

5 See eg *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84 at 90, PC.

6 Thus in *Rowland v Divall* [1923] 2 KB 500, CA, the buyer was held not to be liable to the vendor for the use of the car (although the Court of Appeal did not reach this conclusion using the language of the law of restitution in this way).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(3) THE STRUCTURE OF THE MODERN LAW/20. Injustice.

## 20. Injustice.

The claimant must show that it is unjust that the defendant should retain the benefit without recompensing the claimant<sup>1</sup>. In deciding whether or not a particular enrichment is unjust, the court is not given free rein to give effect to its own perception of what is or is not unjust<sup>2</sup>, but must have regard to the case law in deciding whether, in a particular case, it is unjust that the defendant should retain the benefit without recompensing the claimant<sup>3</sup>. Thus mistake of fact<sup>4</sup>, mistake of law<sup>5</sup>, duress<sup>6</sup>, undue influence<sup>7</sup>, an ultra vires demand by a public authority for tax or other impost<sup>8</sup>, (total) failure of consideration<sup>9</sup>, discharge of the debt of another<sup>10</sup>, necessity<sup>11</sup>, incapacity<sup>12</sup>, and the receipt of property which belongs, whether at law or in equity, to the claimant<sup>13</sup>, have all been recognised as factors which can render an enrichment unjust. The category of factors which can trigger a restitutionary claim is not closed<sup>14</sup> but the courts are likely to recognise a new factor only when compelling reasons have been adduced to persuade the court that it is right to extend the existing categories. However, restitution will generally be denied where the benefit was conferred upon the defendant in the form of a valid gift or in pursuance of a valid common law, equitable or statutory obligation owed by the claimant to the defendant<sup>15</sup>.

1 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 409, [1998] 4 All ER 513 at 561, HL, per Lord Hope of Craighead; *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49 at [21], [2007] 1 AC 558 at [21], [2007] 1 All ER 449 at [21] per Lord Hoffmann. In Birks *Unjust Enrichment* (2nd Edn, 2005), the view was put forward that English law should recognise a general principle that the transfer of a benefit without any legal basis is an unjust enrichment (discussed in *Deutsche Morgan Grenfell Group plc v IRC* supra at [150]-[158] per Lord Walker of Gestingthorpe). See also *Sempre Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34 at [23], [2007] 3 WLR 354 at [23] per Lord Hope of Craighead.

2 This is a criticism which was levelled against unjust enrichment in the past: see eg *Baylis v Bishop of London* [1913] 1 Ch 127 at 140, CA, per Hamilton LJ; *Holt v Markham* [1923] 1 KB 504 at 513, CA, per Scrutton LJ.

3 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 578, [1992] 4 All ER 512 at 532, HL, per Lord Goff of Chieveley ('the recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle').

4 As to mistake of fact see PARAS 33-35 post. As to mistake generally see MISTAKE.

5 As to mistake of law see PARAS 36-37 post.

6 As to duress see PARAS 45-51 post.

7 As to undue influence see PARAS 52-56 post.

8 As to ultra vires demands by public authorities see PARAS 58-61 post.

9 As to total failure of consideration see PARA 87 et seq post.

10 As to discharge of debts see PARA 62 et seq post.

11 As to necessity see PARAS 130-137 post.

12 As to incapacity see PARAS 138-144 post.

13 As to receipt of claimant's property see PARAS 145-149 post. This factor has been described by some academic commentators as 'ignorance' (see eg Birks 'Misdirected funds from the recipient' [1989] LMCLQ 296), but this label has not found its way into the language of the courts.

14 *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 165, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 753, HL, per Lord Goff of Chieveley; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 at 720, CA, per Sir Donald Nicholls V-C; *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) at [16] per Mann J.

15 In other words, the obligation must first be set aside or declared to be invalid before restitution can step in. Thus the court must first consider whether or not the obligations of the parties can be set aside, and only when that question has been answered in the affirmative should the court proceed to consider whether or not restitution should be ordered. For an example of this two stage process see *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452 at 458, CA, per Lord Sterndale MR.

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## 21. Defences.

As the grounds on which a court can order restitution have gradually widened, so the defences have assumed greater significance in keeping liability within acceptable bounds<sup>1</sup>. The principal restitutionary defence is change of position<sup>2</sup> and one effect of its recognition has been said to be that 'it will enable a more generous approach to be taken to the recognition of the right to restitution, in the knowledge that the defence is, in appropriate cases, available'<sup>3</sup>. Other defences which may be invoked by a defendant include: estoppel<sup>4</sup>, bona fide purchase for value<sup>5</sup>, the fact that the claimant cannot make counter-restitution to the defendant or make restitutio in integrum<sup>6</sup>, limitation<sup>7</sup>, passing on<sup>8</sup>, payment over by an agent to his principal<sup>9</sup>, illegality<sup>10</sup> and incapacity<sup>11</sup>.

1 As to defences see further PARA 165 et seq post.

2 This was first recognised by the House of Lords in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL. See further PARA 145 post. As to change of position see PARA 166 et seq post.

3 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 581, [1992] 4 All ER 512 at 534, HL, per Lord Goff of Chieveley.

4 As to estoppel see further PARA 170 post; and ESTOPPEL.

5 As to bona fide purchase see further PARA 171 post.

6 As to impossibility of counter restitution see further PARA 173 post.

7 As to limitation see generally LIMITATION PERIODS.

8 As to passing on see further PARA 172 post.

9 As to payment by agent to principal see further PARA 169 post.

10 As to illegality see further PARAS 174-179 post.

11 As to incapacity see further PARAS 180-184 post. See also PARA 138 et seq post.

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## 22. Remedies.

The remedy to which the claimant is entitled is generally a personal remedy which requires the defendant to pay to the claimant the value of the enrichment which the defendant has obtained at the claimant's expense<sup>1</sup>. Alternatively, a claimant may be able to seek a proprietary remedy<sup>2</sup> such as a declaration that the defendant holds an identifiable asset on trust for the claimant<sup>3</sup>, or to assert a lien over an asset or a group of assets<sup>4</sup> or that he should be subrogated to the rights of a third party over the property of the defendant<sup>5</sup>.

1 As to interest see PARA 23 post.

2 See PARA 27 post.

3 See eg *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC.

4 See eg the maritime lien held to exist in maritime salvage cases: see PARA 134 post.

5 See eg *Boscawen v Bajwa* [1995] 4 All ER 769, [1996] 1 WLR 328, CA; *Lord Napier and Ettrick v Hunter* [1993] AC 713, [1993] 1 All ER 385, HL.

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## 23. Interest.

The court has power to make an award for compound interest where that is necessary to achieve justice for the claimant<sup>1</sup>.

The court has jurisdiction at common law to award compound interest where the claimant seeks a restitutionary remedy for the time value of money paid under a mistake. The remedy of restitution differs from that of damages<sup>2</sup>. It is the gain to the defendant that needs to be

measured, not the loss to the claimant. The gain needs to be reversed if the claimant is to make good his remedy. The process is one of subtraction, not compensation. As in cases of property other than money where the claim included restitution for the value of the use of the asset that had been transferred, subtraction of the enrichment from the defendant includes more than the return of the money that was transferred at its nominal or face value<sup>3</sup>.

If a conventional rate of interest is to be adopted, it should be one which is appropriate to the circumstances of the enriched party. The use of ordinary commercial rates of interest, at ordinary rests, would be appropriate if those rates were relevant to the enriched party's circumstances. However, it is open to the enriched party to show that it would have been able to borrow money at rates or on terms more favourable to it than those available in the ordinary commercial market. If it can do that, then ordinary rates and other terms have to give way to those that are relevant to the circumstances of the enriched party<sup>4</sup>.

1 *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34, [2007] 3 WLR 354 (Lord Scott of Foscote and Lord Mance dissenting). This case concerned United Kingdom tax provisions requiring payment of advanced corporation tax by subsidiary companies whose parent company was outside the United Kingdom. Following a ruling by the European Court of Justice that such provisions contravened the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 52 (now renumbered as art 43 by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ) (see joined cases C-397/98 and C-410/98) *Metallgesellschaft Ltd v IRC* [2001] Ch 620, [2001] All ER (EC) 496, [2001] STC 452), a number of claims were brought against the Inland Revenue (now Her Majesty's Revenue and Customs), of which *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* supra was a test claim under a group litigation order. The restrictions on recovering damages in *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] AC 429 no longer apply to claims in restitution: see *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* supra at [92]-[97] per Lord Nicholls of Birkenhead.

2 See generally DAMAGES.

3 See *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34 at [31]-[33], [2007] 3 WLR 354 at [31]-[33] per Lord Hope of Craighead.

4 See *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34 at [46]-[49], [2007] 3 WLR 354 at [46]-[49] per Lord Hope of Craighead.

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## 24. Relationship between restitution and contract law.

Now that it is recognised that the law of restitution is separate and distinct from the law of contract<sup>1</sup>, the relationship between these two branches of the law must be considered. Where the claimant and the defendant are in a contractual relationship, the contract regulates the rights and liabilities of the parties until such time as the contract is discharged or set aside<sup>2</sup>. Whether or not the contract has in fact been discharged or set aside is a matter for the law of contract<sup>3</sup>. However, once the contract has been discharged, the law of restitution may and often does have a role to play in determining the remedial consequences of the discharge or the setting aside of the contract<sup>4</sup>.

1 See PARA 1 ante.

2 As to discharge of contracts see CONTRACT vol 9(1) (Reissue) PARA 920 et seq. The rule may not be an absolute one. In *Miles v Wakefield Metropolitan District Council* [1987] AC 539, [1987] 1 All ER 1089, HL, the possibility was recognised that a claimant who is in breach of contract may be entitled to recover the reasonable value of work carried out under the contract notwithstanding the fact that the defendant has not terminated the contract on account of the claimant's breach: see further PARA 120 post. See also *Mowlem plc*

(*t/a Mowlem Marine*) v *Stena Line Ports Ltd* [2004] EWHC 2206 (TCC), [2004] All ER (D) 217 (Oct); *S & W Process Engineering Ltd v Cauldron Foods Ltd* [2005] EWHC 153 (TCC), [2005] All ER (D) 205 (Mar).

3 See further CONTRACT vol 9(1) (Reissue) PARA 920 et seq. A number of restitutionary claims arise out of the discharge or setting aside of a contract (eg where the contract has been discharged by breach or frustration or has been set aside on the ground of duress, undue influence, mistake, misrepresentation, incapacity or illegality).

4 See note 3 supra. The law of contract also contains its own remedial provisions (in the form of the action for damages for breach of contract: see CONTRACT; DAMAGES) and the relationship between contractual remedies and restitutionary remedies requires careful consideration. The general rule is that the claimant has a choice whether to bring a claim in contract for damages or to bring a restitutionary claim, where such a claim is available, to recover the value of the benefit which he conferred on the defendant: see PARA 91 post. It is a separate question whether or not the claimant can recover gain-based or restitutionary damages for a breach of contract: see PARA 150 et seq post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(3) THE STRUCTURE OF THE MODERN LAW/25. Relationship between restitution and the law of tort.

## 25. Relationship between restitution and the law of tort.

The relationship between the law of tort and the law of restitution is not as close as the relationship between the law of contract and the law of restitution<sup>1</sup> and hence has given rise to fewer practical problems<sup>2</sup>. A defendant who commits a tort will generally be liable to pay damages to the claimant to compensate him for the loss which he has suffered as a result of the commission of the tort<sup>3</sup>. However, instead of claiming compensatory damages, a claimant may elect to seek damages the aim of which is to strip the defendant of the gain which he has made as a result of the commission of the tort<sup>4</sup>. In such a case the claimant is said to have 'waived the tort' (although this label is misleading)<sup>5</sup>. The choice which the claimant faces in such a case is not between different causes of action (tort or restitution) but between different remedies for the tort or the wrong<sup>6</sup>. In other words, the cause of action is the tort (or the wrong) but the claimant elects to recover restitutionary (or gain-based) damages rather than compensatory damages<sup>7</sup>.

1 See PARA 24 ante.

2 In some situations, however, a claimant may be able to bring a claim in tort or a claim in restitution to reverse an unjust enrichment. Eg where the defendant receives property which, at the time of receipt, traceably belongs to the claimant, the claimant may bring a claim in restitution to recover the value of the benefit which the defendant has obtained or may be able to bring a claim in the tort of conversion to recover the value of the property received by the defendant: see *Lipkin Gorman (a firm) v Karpnale* [1991] 2 AC 548, [1992] 4 All ER 512, HL. The point is not an insignificant one in practical terms. While change of position operates as a defence to a restitutionary claim (see PARAS 166-169 post) it does not act as a defence to a claim in conversion so that a claimant might be better advised to bring a claim in conversion rather than a restitutionary claim. As to conversion see TORT vol 45(2) (Reissue) PARAS 542 et seq, 548 et seq.

3 See further TORT vol 45(2) (Reissue) PARA 615 et seq.

4 Not every tort gives rise to a claim for gain-based or restitutionary damages. As to those torts which do give rise to such a claim see PARA 160 post.

5 See PARA 161 post.

6 It is necessary to add 'the wrong' to encompass the case where the defendant commits not a tort but an equitable wrong, such as breach of confidence, and the claimant seeks to recover damages to strip the defendant of the gain which he has made as a result of committing the wrong: see PARA 150 et seq post.

7 See generally Burrows *The Law of Restitution* (2nd Edn, 2002) Ch 14; and PARA 163 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/1. INTRODUCTION/(3) THE STRUCTURE OF THE MODERN LAW/26. Relationship between restitution and the law of property.

## 26. Relationship between restitution and the law of property.

A claim to reverse an unjust enrichment which the defendant has received at the claimant's expense must be distinguished from a claim to vindicate the claimant's property which is in the hands of the defendant<sup>1</sup>. A claimant who brings a claim to vindicate his property rights must show that the defendant is in receipt of property which belongs beneficially to the claimant or its traceable<sup>2</sup> proceeds<sup>3</sup>. He does not have to show that the defendant has been enriched by the receipt of his property<sup>4</sup>. However, a claimant in a restitutionary claim is not concerned to show that the defendant is in receipt of property belonging beneficially to the claimant or its traceable proceeds<sup>5</sup>. Rather, he must show that the defendant has been unjustly enriched at his expense<sup>6</sup>. The distinction between a claim to reverse an unjust enrichment and a claim to vindicate the claimant's property rights can be a difficult one to draw<sup>7</sup> but it can have important practical consequences. A restitutionary claim may be subject to the defence of change of position<sup>8</sup> but the defence is unlikely to apply where the claim is one to vindicate the claimant's property rights<sup>9</sup>.

1 See eg *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL.

2 'Tracing is . . . neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim': *Foskett v McKeown* [2001] 1 AC 102 at 128, [2000] 3 All ER 97 at 120, HL, per Lord Millett. In other words, 'tracing is a process of identifying assets: it belongs to the realm of evidence. It tells us nothing about legal or equitable rights to the assets traced': *Foskett v McKeown* supra at 113 and 106 per Lord Steyn. Thus 'the successful completion of a tracing exercise may be preliminary to a personal claim (as in *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, [1993] BCLC 735) or a proprietary one, to the enforcement of a legal right (as in *Trustees of the Property of FC Jones & Sons (a firm) v Jones* [1997] Ch 159, [1996] 4 All ER 721, CA) or an equitable one': *Foskett v McKeown* supra at 128 and 120-121 per Lord Millett. Recognition of the fact that tracing is a process not a remedy may ultimately lead to the development of a common set of rules which are applicable whether the claim which is brought by the claimant is one at law or in equity: see *Foskett v McKeown* supra at 113 and 106 per Lord Steyn. While Lord Millett recognised that 'one set of tracing rules is enough' (*Foskett v McKeown* supra at 128 and 121) he stated that this was not 'the occasion to explore these matters further' (a view shared by Lord Browne-Wilkinson at 109 and 102). Thus the rules of common law tracing and equitable tracing (see EQUITY vol 16(2) (Reissue) PARAS 861-866) continue to diverge (eg the existence of a fiduciary relationship remains a pre-condition for applying equity's tracing rules and the common law continues to experience great difficulty in tracing through a mixed fund, a difficulty not shared by equity's tracing rules) but one consequence of the dicta of Lord Steyn and Lord Millett in *Foskett v McKeown* supra may be the gradual elimination of the present differences between common law and equitable tracing. As to tracing see further Smith *The Law of Tracing* (1997).

3 *Foskett v McKeown* [2001] 1 AC 102 at 108, [2000] 3 All ER 97 at 101, HL, per Lord Browne-Wilkinson, at 115 and 108 per Lord Hoffmann, and at 129 and 121-122 per Lord Millett.

4 *Foskett v McKeown* [2001] 1 AC 102 at 129, [2000] 3 All ER 97 at 121, HL, per Lord Millett.

5 *Foskett v McKeown* [2001] 1 AC 102 at 129, [2000] 3 All ER 97 at 121, HL, per Lord Millett. There is an exception where the claim is based on the fact that the defendant received property which, at the time of receipt, traceably belonged to the claimant (see eg *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL) but in such a case the claimant is not required to show that the defendant remains in receipt of property which belongs to the claimant; it suffices that the property traceably belongs to the claimant at the time of receipt.

6 *Foskett v McKeown* [2001] 1 AC 102 at 129, [2000] 3 All ER 97 at 121, HL, per Lord Millett.

7 The line has proved to be particularly difficult to draw in the case where the claim is based on the fact that the defendant received property which, at the time of receipt, traceably belonged to the claimant. The leading example of this form of liability is *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL. As a matter of authority, it is clear that this is a form of restitutionary liability because the House of Lords so regarded it. However, the point has been the subject of vigorous academic debate. Some academic writers maintain that the claim properly lies within the law of property (see eg Swadling 'Restitution and Bona Fide Purchase' in Swadling (Ed) *The Limits of Restitutionary Claims: A Comparative Analysis* (1997) p 79), others consider that it is part of the law of restitution (see eg Birks 'The English Recognition of Unjust Enrichment' [1991] LMCLQ 473; and McKendrick 'Restitution, Misdirected Funds and Change of Position' (1992) 55 MLR 377), while others take a mid-position according to which restitutionary remedies can be employed to vindicate property rights with which the defendant has interfered (see Virgo *The Principles of the Law of Restitution* (2nd Edn, 2006) pp 11-17).

8 As to the defence of change of position see PARAS 166-169 post.

9 There is no authority to suggest that change of position can apply outside the law of restitution.

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## 27. Proprietary restitutionary claims.

Distinct from pure proprietary claims, where the claimant seeks to vindicate his existing proprietary rights, are proprietary restitutionary claims where the claimant is given a proprietary claim in order to reverse an unjust enrichment<sup>1</sup>. Most restitutionary claims are personal in nature and therefore do not depend upon the defendant's continued retention of a particular piece of property<sup>2</sup>. The courts have, however, on occasion been prepared to recognise the existence of proprietary restitutionary remedies<sup>3</sup>, for example via the imposition of a constructive trust<sup>4</sup>, a lien<sup>5</sup>, or through subrogation<sup>6</sup>.

1 In this title the existence or otherwise of a proprietary restitutionary claim is considered in relation to each particular ground on which the courts have recognised a restitutionary claim: as to mistake see PARA 39 post; as to duress see PARA 51 post; as to undue influence see PARA 56 post; as to ultra vires demands by public authority see PARA 61 post; as to total failure of consideration see PARA 111 post; as to quantum meruit and quantum valebat see PARA 129 post; as to incapacity see PARA 144 post; as to receipt of claimant's property see PARA 149 post; and as to defence of illegality see PARA 179 post.

The distinction between pure proprietary claims and proprietary restitutionary claims is an issue which has excited much academic debate (see eg Goode 'Proprietary Restitutionary Remedies' in Cornish, Nolan, O'Sullivan and Virgo (Eds) *Restitution: Past, Present and Future* (1998) p 63) but it has not yet had much of an impact on the courts. A pure proprietary claim is one in which the claimant establishes that the defendant has retained property which belongs to the claimant, whereas a proprietary restitutionary claim is one in which the law creates a new proprietary right in order to reverse an unjust enrichment. The difficulty arises where the claimant can only establish that the defendant retains property which belongs to the claimant after conducting a tracing exercise. In such a case one can either say that such a claim is a pure proprietary claim (on the ground that it has been established, by a process of tracing through substitutes, that the asset in the hands of the defendant belongs to the claimant) or that the claim is in fact a proprietary restitutionary claim on the ground that such a claim involves the creation of new proprietary rights over property that previously did not belong to the claimant but rather is a substitution for property which was previously owned by the claimant. The debate is not without practical significance. For example it may be relevant to the defence of change of position (which is unlikely to be applicable to a pure proprietary claim, but may well apply to a proprietary restitutionary claim) and it may also be relevant to the conflict of laws (see eg *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 All ER 585, [1996] 1 WLR 387, CA, noted by Birds [1995] LMCLQ 308, [1996] LMCLQ 57, Swadling [1996] LMCLQ 63, Grantham and Rickett [1996] LMCLQ 463 and Stevens (1996) 59 MLR 741).

2 See eg *Foskett v McKeown* [2001] 1 AC 102 at 129, [2000] 3 All ER 97 at 121, HL, per Lord Millett.

3 See PARA 22 ante.

4 See eg *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC. In the past the words 'constructive trust' have been used rather loosely by the courts but they have recently begun to urge a more discriminating use of these words, in particular that they should not be used where equity gives relief against fraud by making a person sufficiently implicated in the fraud accountable in equity (*Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 at 409, CA, per Millett LJ). See more generally Millett 'Restitution and Constructive Trusts' (1998) 114 LQR 399. As to constructive trusts see further TRUSTS vol 48 (2007 Reissue) PARA 687 et seq.

5 See eg the maritime lien recognised in salvage cases: see PARA 134 post. As to lien generally see LIEN.

6 See eg *Boscawen v Bajwa* [1995] 4 All ER 769, [1996] 1 WLR 328, CA; *Lord Napier and Ettrick v Hunter* [1993] AC 713, [1993] 1 All ER 385, HL; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL. As to subrogation see EQUITY vol 16(2) (Reissue) PARAS 770-776.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/2. MISTAKE/(1) INTRODUCTION/28. In general.

## 2. MISTAKE

### (1) INTRODUCTION

#### 28. In general.

The claim to recover the value of a benefit conferred under a mistake is a well-established restitutionary claim<sup>1</sup>. Most, but not all<sup>2</sup>, of the cases concern mistaken payments of money. Where the benefit conferred upon the defendant takes the form of goods or services, then it must first be established that the defendant was enriched by the receipt of the goods or services<sup>3</sup> before proceeding to determine whether or not there has been a mistake sufficient to give rise to a restitutionary claim. The test to be applied in determining whether the mistake is sufficient to entitle the claimant to recover the value of the benefit conferred does not depend on whether the benefit conferred takes the form of money or is a non-money benefit; the same test is applicable in both contexts<sup>4</sup>.

1 However, the validity of a claim to recover a benefit conferred under a mistake of law was only recognised in England by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL: see PARA 36 post. As to mistake generally see MISTAKE. The right to restitution arises the moment there is unjust enrichment; no demand for repayment need be made before making a restitutionary claim: *Fuller v Happy Shopper Markets Ltd* [2001] 1 WLR 1681 (tenant entitled to withhold rent following mistaken overpayment of rent).

2 See eg *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA.

3 Ie by applying the tests set out in PARA 11 et seq ante.

4 The only difference is that, in the case of goods or services, recovery has never been confined to liability mistakes (see eg *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA). However, given that the recovery of money is no longer confined to liability mistakes (see PARAS 33, 35 post), there is no longer any discernible difference, as far as the reason for restitution is concerned, between the recovery of money and non-money benefits.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/2. MISTAKE/(1) INTRODUCTION/29. The meaning of mistake.

## 29. The meaning of mistake.

A claimant is mistaken when, had he known the true state of affairs, he would not have conferred the benefit on the defendant and, for this purpose, it does not matter whether he conferred the benefit as a result of a misunderstanding, incorrect information or 'sheer ignorance'<sup>1</sup>. Thus mistake embraces both the case where the claimant transfers the benefit consciously relying on certain matters which turn out to be untrue<sup>2</sup> and the case where the claimant has simply forgotten about, or was ignorant of, the relevant matter<sup>3</sup>. In both cases the claimant's decision to transfer the asset is vitiated by his mistake. In all cases the claimant must be aware of the fact that a transfer of an asset has taken place: a claimant who is unaware of the fact that a transfer has taken place cannot rely on mistake as the basis for a restitutionary claim<sup>4</sup>. The question whether or not the claimant was mistaken must be answered at the time at which the benefit was conferred on the ground that that is the moment in time at which the cause of action accrues<sup>5</sup>. The mistake must relate to some existing fact or state of affairs<sup>6</sup>; where it relates to a future matter it is not a mistake but a misprediction and a misprediction does not generally give rise to a restitutionary claim<sup>7</sup>.

1 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 409, [1998] 4 All ER 513 at 562, HL, per Lord Hope of Craighead; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 369, 374, Aust HC, per Mason CJ, Deane J, Toohey J, Gaudron J and McHugh J quoting Winfield 'Mistake of law' (1943) 59 LQR 327 (mistake 'not only signifies a positive belief in the existence of something which in reality does not exist but it may also include sheer ignorance of something relevant to the transaction in hand'). The ignorance must relate to a factor relevant to the decision to transfer the asset. Ignorance of the fact that the transfer of the asset has taken place raises different issues: see PARA 145 post. As to mistake generally see MISTAKE.

2 See eg *RE Jones Ltd v Waring & Gillow Ltd* [1926] AC 670, HL.

3 See eg *Kelly v Solari* (1841) 9 M & W 54; cf *Barrow v Isaacs and Son* [1891] 1 QB 417 at 420-421, CA, per Lord Esher MR ('mere forgetfulness is not mistake at all in ordinary language').

4 Thus *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL, cannot be analysed in terms of mistake.

5 *Baker v Courage & Co* [1910] 1 KB 56; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 386, [1998] 4 All ER 513 at 542, HL, per Lord Goff of Chieveley, and at 409 and 562 per Lord Hope of Craighead.

6 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 398, [1998] 4 All ER 513 at 552, HL, per Lord Hoffmann. The requirement that the mistake must relate to an existing state of affairs must be modified slightly in the context of mistake of law: see PARA 37 post.

7 See Birks *An Introduction to the Law of Restitution* (1985) pp 147-148, referred to in *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50 at [29], [2002] 1 All ER (Comm) 193 at [29]. Cf *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712 at 719, [1957] 1 WLR 932 at 939 per Barry J. Although a claimant who has made a misprediction cannot have a restitutionary claim based on mistake, he may be able to bring a claim on some other ground, such as total failure of consideration: see PARA 87 et seq post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/2. MISTAKE/(1) INTRODUCTION/30. The knowledge of the claimant.

## 30. The knowledge of the claimant.

A claimant who knows that he is not liable to transfer a benefit to the defendant cannot be said to have been mistaken if he chooses nevertheless to confer the benefit on the defendant<sup>1</sup>. The existence of a doubt in the mind of the claimant, at the time at which the benefit was conferred, as to whether or not he was obliged to transfer the benefit to the defendant may preclude a restitutionary claim to recover the value of the benefit on the basis of mistake<sup>2</sup>,

although it may be possible for the claimant to bring such a claim where the degree of doubt is not great<sup>3</sup> or where the defendant has concealed from the claimant the fact that he was not obliged to confer the benefit<sup>4</sup>. Where the claimant resolves the doubt in favour of conferring the benefit after the defendant has commenced legal proceedings against him<sup>5</sup> or after being the subject of a threat of legal proceedings by the defendant<sup>6</sup> he will not generally be entitled to recover the benefit. Nor will the claimant be able to recover where he has entered into an agreement with the defendant to settle the doubt or dispute<sup>7</sup> or where he is otherwise deemed to have conferred the benefit in order to close the transaction<sup>8</sup>.

1 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 373-374, Aust HC, per Mason CJ, Deane J, Toohey J, Gaudron J and McHugh J. This is so unless, as in *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249, it can be said that the claimant was mistaken because he conferred the benefit in the mistaken belief that he was entitled to recover it from the defendant. Although such a mistake may be a mistake of law it can nevertheless generate a right of recovery: see PARA 36 post. As to mistake generally see MISTAKE. See also *Cobbold v Bakewell Management Ltd* [2003] EWHC 2289 (Ch) at [19] per Rimer J, where it was held that the claimants could not seek restitution on the ground of mistake of law where they made a payment hoping that it would be shown by a later court decision to have been paid under a mistake of law; they were making the payment with their eyes wide open to the uncertain basis on which they made it.

2 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 410, [1998] 4 All ER 513 at 562, HL, per Lord Hope of Craighead; *Wason v Wareing* (1852) 15 Beav 151. While the claimant in such a case cannot base his claim on mistake, he may be able to recover on some other basis, such as duress, provided that the ingredients of that claim can be established on the facts.

3 See eg *Chatfield v Paxton* (1799) 2 East 471n, DC. The degree of doubt which can exist without acting as a barrier to a claim is presently unclear. In *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558, [2007] 1 All ER 449, it was held that the mistake was not discoverable until the date of the decisive European judgment, and not when the possibility of litigation on the matter first arose. In that case different approaches were taken to the issue of doubt, with Lord Hoffmann (at [26]-[27]) taking the view that 'the real point is whether the person who made the payment took the risk that he might be wrong', while Lord Hope of Craighead (at [64]-[65]) saw the issue 'as being essentially one of causation. What was the effect of the mistake on the payer?'.

4 See eg *Chatfield v Paxton* (1799) 2 East 471n, DC, where both Ashurst J and Grose J attached importance to the fact that the defendant had fraudulently concealed from the claimant the true position. A defendant who has acted in bad faith in receiving the benefit may be liable to return it and a defendant may be guilty of bad faith if he knows that the claimant conferred the benefit while acting under a mistake: see *Dixon v Monkland Canal Co* (1831) 5 Wils & S 445 at 451, HL, per Lord Brougham LC; *Ward & Co v Wallis* [1900] 1 QB 675 at 678-679 per Kennedy J (exception to the rule in *Marriott v Hampton* (1797) 2 Esp 546, where the defendant was not bona fide because he knew that the claimant had made a mistake in entering into the settlement).

5 See eg *Moore v Vestry of Fulham* [1895] 1 QB 399, CA; *Longridge v Dorville* (1821) 5 B & Ald 117, DC.

6 See eg *William Whiteley Ltd v R* (1909) 101 LT 741; *Callisher v Bischoffsheim* (1870) LR 5 QB 449, DC; *Longridge v Dorville* (1821) 5 B & Ald 117.

7 *Callisher v Bischoffsheim* (1870) LR 5 QB 449, DC; *Cook v Wright* (1861) 1 B & S 559, DC; *Llewellyn v Llewellyn* (1845) 3 Dow & L 318; *Haigh v Brooks* (1839) 10 Ad & El 309, DC; *Longridge v Dorville* (1821) 5 B & Ald 117; *Marriott v Hampton* (1797) 2 Esp 546; *Brown v M'Kinally* (1795) 1 Esp 279.

8 The circumstances in which a claimant will be deemed to have paid in order to close the transaction is notoriously unclear, particularly in the case where the claimant pays in response to a mere demand for payment. The scope of the defence is considered in *Maskell v Horner* [1915] 3 KB 106 at 118, CA, per Lord Reading CJ; *Mason v New South Wales* (1959) 102 CLR 108 at 143 per Windeyer J; *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 98, sub nom *Woolwich Building Society v IRC (No 2)* [1991] 4 All ER 577 at 599-600, CA, per Glidewell LJ (affd [1993] AC 70 at 165-166, [1992] 3 All ER 737 at 754, HL, per Lord Goff of Chieveley).

### 31. Mistake by agent.

Where an agent mistakenly confers a benefit on a third party, the disclosed principal<sup>1</sup> or agent<sup>2</sup> may be able to sue to recover the value of the benefit so conferred where the mistake is of a type which would ordinarily entitle the person mistaken to recover the value of the benefit so conferred. The fact that another agent of the principal had full knowledge of the relevant facts does not prevent the mistaken agent or principal from recovering the value of the benefit provided that the agent with the knowledge did not know that the benefit had been conferred on an erroneous basis<sup>3</sup>.

1 *Bowstead and Reynolds on Agency* (18th Edn, 2005) PARA 8-009, citing *Stevenson v Mortimer* (1778) 2 Cowp 805. As to agency generally see AGENCY. As to mistake see further MISTAKE.

2 Generally the principal will be the proper person to bring the claim but there is authority to support the proposition that the agent can bring a claim: see *Bowstead and Reynolds on Agency* (18th Edn, 2005) Article 110, citing *Duke of Norfolk v Worthy* (1808) 1 Camp 337. However, this may be subject to an exception where the agent was mistaken as to his authority to pay but the money was in fact owed by the principal. In such a case the agent may not be able to recover the money paid, at least where the payment was effective to discharge the liability of the principal: see *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] QB 110, [1999] 1 All ER (Comm) 8, CA.

3 *Anglo-Scottish Beet Sugar Corpn Ltd v Spalding UDC* [1937] 2 KB 607, [1937] 3 All ER 335; *Turvey v Dentons (1923) Ltd* [1953] 1 QB 218 at 224, [1952] 2 All ER 1025 at 1028-1029 per Pilcher J.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/2. MISTAKE/(1) INTRODUCTION/32. Mistake of fact or law.

### 32. Mistake of fact or law.

A mistake may be one of fact or it may relate to a question of law<sup>1</sup>. Given the separate historical development of the two types of mistake it is necessary to discuss them separately<sup>2</sup>.

1 See MISTAKE vol 77 (2010) PARA 9 et seq. A mistake may be characterised either as a mistake of fact or a mistake of law: see eg *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941 at 955, [1999] 1 WLR 1249 at 1264 per Neuberger J (although he stated that to classify the mistake made in relation to the first five overpayments as one of law rather than fact would have been an 'artificial way of explaining what happened').

2 As to mistake of fact see PARAS 33-35 post; and as to mistake of law see PARAS 36-37 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/2. MISTAKE/(2) MISTAKE OF FACT/33. Liability mistake.

## (2) MISTAKE OF FACT

### 33. Liability mistake.

A claimant who confers a benefit on another under a mistake of fact may be able to bring a restitutionary claim to recover the value of the benefit so conferred on that other party. The law on the recovery of benefits conferred under a mistake is in the process of evolution and the cases are not easily reconcilable<sup>1</sup>. Traditionally, the only type of mistake which gave rise to a restitutionary claim was a 'liability mistake', that is to say the mistake had to be 'as to a fact

which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money<sup>12</sup>. While a liability mistake is the most common type of mistake which gives rise to a restitutionary claim, it is not the only one. Restitution has been ordered in cases where the mistake related to a liability of the claimant which will accrue in the future<sup>3</sup>, where the claimant mistakenly believed that he was under a moral obligation to pay the money<sup>4</sup>, where the claimant paid the money under the mistaken belief that he was bound to do so under a legal liability to a third party<sup>5</sup> and where the claimant had performed services on the goods of another in the mistaken belief that he was the owner of the goods<sup>6</sup>. It is a matter of doubt whether or not a claimant can recover a gift which has been made under mistake<sup>7</sup>, although in equity the courts have been willing to set aside formal gifts where the mistake is a serious one<sup>8</sup>. In the light of these cases it can no longer be said that there is any requirement that the mistake must be a liability mistake in order to generate a right of recovery<sup>9</sup>.

1 This has been judicially recognised on a number of occasions: see eg *Barclays Bank Ltd v WJ Simms Son and Cooke (Southern) Ltd* [1980] QB 677 at 686, [1979] 3 All ER 522 at 527 per Robert Goff J; *Weld-Blundell v Synott* [1940] 2 KB 107 at 112 per Asquith J; *Commercial Bank of Australia Ltd v Younis* [1979] 1 NSWLR 444 at 447, NSW CA, per Hope J.

2 *Aiken v Short* (1856) 1 H & N 210 at 215 per Bramwell B. See also *Kelly v Solari* (1841) 9 M & W 54 at 58 per Parke B; *Deutsche Bank (London Agency) v Beriro Co Ltd* (1895) 1 Com Cas 255 at 259, CA, per Lindley LJ; *Re Bodega Co Ltd* [1904] 1 Ch 276 at 286 per Farwell J; *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465, HL; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, [1974] 3 All ER 834; *United Overseas Bank v Jiwani* [1977] 1 All ER 733, [1976] 1 WLR 964; *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, [1979] 3 All ER 1025; *Official Custodian for Charities v Mackey (No 2)* [1985] 2 All ER 1016, [1985] 1 WLR 1308. See further MISTAKE.

3 *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465, HL. The reasoning in the case has been criticised on the ground that a mistaken belief that a liability to pay money will arise in the future is a misprediction and not a mistake, although the result in the case can be justified on other grounds: see Virgo *The Principles of the Law of Restitution* (2nd Edn, 2006) p 149.

4 *Larner v London County Council* [1949] 2 KB 683, [1949] 1 All ER 964, CA. See also *Lowe v Wells Fargo & Co Express* 78 Kans 105, 96 P 74 (1908), discussed in Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 201.

5 *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL; *Kleinwort, Sons & Co Ltd v Dunlop Rubber Co* (1907) 97 LT 263, HL; *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84, PC.

6 *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA.

7 Dicta in *Morgan v Ashcroft* [1938] 1 KB 49 at 66, [1937] 3 All ER 92 at 98, CA, per Sir Wilfred Greene MR are hostile to the recognition of such a claim, although the case was decided at a time when the 'liability mistake' test was more firmly established than it is today. Such a claim has, however, been allowed in New Zealand in *University of Canterbury v A-G* [1995] 1 NZLR 78 (where the mistake was held to be 'fundamental or basic' and the court ordered the defendant to return the property which had been transferred under a mistake). However, it is submitted that the courts will continue to recognise the need for caution lest the floodgates be opened to claims by donors who subsequently believe that they have cause to regret their generosity.

8 See eg *Meadows v Meadows* (1853) 16 Beav 401; *Ogilvie v Allen* (1899) 15 TLR 294, HL; *Phillipson v Kerry* (1863) 32 Beav 628; *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476; *Ellis v Ellis* (1909) 26 TLR 166; *Gibbon v Mitchell* [1990] 3 All ER 338 at 341-343, [1990] 1 WLR 1304 at 1307-1309 per Millett J.

9 See PARA 35 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/2. MISTAKE/(2) MISTAKE OF FACT/34. Fundamental mistake.

### 34. Fundamental mistake.

There is some support in the authorities for the proposition that a mistake must be 'fundamental' in order to give rise to a restitutionary right of recovery<sup>1</sup>. While this test may be appropriate where the parties are in a contractual relationship<sup>2</sup> or in connection with the passing of property<sup>3</sup>, 'the type of mistake necessary to give rise to a right to recover under the restitutionary remedy of money paid under a mistake of fact need not necessarily be of the same fundamental character that makes a contract totally void'<sup>4</sup>. While a 'fundamental' mistake will suffice in principle to give rise to a restitutionary claim, the category of mistakes which can generate a restitutionary claim would appear not to be confined to such mistakes.

1 See eg *Norwich Union Fire Insurance Society Ltd v William H Price Ltd* [1934] AC 455 at 463, PC; *Morgan v Ashcroft* [1938] 1 KB 49 at 66, [1937] 3 All ER 92 at 98, CA, per Sir Wilfred Greene MR, and at 74 and 103 per Scott LJ. As to mistake generally see MISTAKE.

2 See eg *Bell v Lever Bros Ltd* [1932] AC 161, HL; and CONTRACT vol 9(1) (Reissue) PARA 895; MISTAKE vol 77 (2010) PARAS 21-23.

3 See eg *Cundy v Lindsay* (1878) 3 App Cas 459, HL; and MISTAKE vol 77 (2010) PARA 26.

4 *Citibank NA v Brown Shipley & Co Ltd* [1991] 2 All ER 690 at 700-701, [1991] 1 Lloyd's Rep 576 at 584 per Waller J. The requirement that the mistake must be 'fundamental' in order to ground a restitutionary claim has been decisively rejected by the High Court of Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 377-378, Aust HC, per Mason CJ, Deane J, Toohey J, Gaudron J and McHugh J.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/2. MISTAKE/(2) MISTAKE OF FACT/35. Causative mistake.

### 35. Causative mistake.

The law is moving towards recognising the principle that 'if a person pays money to another under a mistake of fact which caused him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact'<sup>1</sup>. In considering whether or not the mistake caused the payment to be made, the courts apply the 'but for' test, that is to say the claimant must show that, had it not been for the mistake, he would not have transferred the benefit to the defendant<sup>2</sup>. In addition, the claimant may possibly have to establish the existence of a 'close and direct connection between the mistake and the payment and/or a requirement that the mistake impinges on the relationship between payer and payee'<sup>3</sup>. It is for the claimant to prove that he would not have conferred the benefit but for his mistake<sup>4</sup>. The fact that the claimant was careless or negligent in conferring the benefit on the defendant does not, of itself, operate to bar the claim<sup>5</sup>. Nor is there any requirement that the mistake must have been 'as between' the payer and the payee<sup>6</sup>.

1 See *Barclays Bank Ltd v WJ Simms Son and Cooke (Southern) Ltd* [1980] QB 677 at 695, [1979] 3 All ER 522 at 535 per Robert Goff J; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423 at 440, [1989] 1 WLR 912 at 933, CA, per Dillon LJ; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, Aust HC; *University of Canterbury v A-G* [1995] 1 NZLR 78; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227, [1998] 1 All ER 737 at 740-741, HL, per Lord Steyn, and at 234 and 747 per Lord Hoffmann; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 358, [1998] 4 All ER 513 at 518, HL, per Lord Browne-Wilkinson, at 399 and 553 per Lord Hoffmann, and at 408 and 561 per Lord Hope of Craighead; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941 at 963-964, [1999] 1 WLR 1249 at 1272-1273 per Neuberger J; *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49 at [143], [2007] 1 AC 558 at [143], [2007] 1 All ER 449 at [143] per Lord Walker of Gestingthorpe. Some support for a causal test can be gleaned from the earlier decisions: see eg *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 at 679-680, HL, per Viscount Cave LC, at 686 per Lord Shaw of Dunfermline, and at 691-692 per Lord Sumner. The leading case in support of the 'liability mistake' test is probably the decision of the House of Lords in *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJB 465, HL (see PARA 33 ante), but even in that case dicta can be found (at 471 per Lord Shaw, and at 472 per Lord Mersey) which are broad enough to support a test based solely on

causation. Nevertheless, the fact that *Kerrison v Glyn, Mills, Currie & Co* supra has never been formally overruled and the fact that it has been interpreted as an authority which supports the liability mistake test suggests that it cannot be assumed that the law has finally taken the step of abandoning that test in favour of one based solely on causation. As to mistake generally see MISTAKE.

2 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 408, [1998] 4 All ER 513 at 560, HL, per Lord Hope of Craighead; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941 at 964, [1999] 1 WLR 1249 at 1272-1273 per Neuberger J. Where there are two sufficient causes of the payment, only one of which is the mistake, the question whether the payment can be recovered is a matter of some doubt. If an analogy is drawn with cases on misrepresentation (see eg *Edgington v Fitzmaurice* (1885) 29 ChD 459, CA) or duress (see eg *Barton v Armstrong* [1976] AC 104, [1975] 2 All ER 465, PC; *Dimskal Shipping Co SA v International Transport Workers' Federation, The Evia Luck* [1992] 2 AC 152 at 165, [1991] 4 All ER 871 at 878, HL, per Lord Goff of Chieveley; *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 at 636 per Mance J), then a claimant in such a case may be able to recover. A contrary view, however, would appear to be dictated by the more restrictive approach adopted by Neuberger J in *Nurdin & Peacock plc v DB Ramsden & Co Ltd* supra.

3 *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941 at 963-964, [1999] 1 WLR 1249 at 1273 per Neuberger J (although he also said (at 963 and 1272) that he doubted whether 'such further requirements, if they exist, would take matters any further in most cases'). The existence of these requirements has been doubted by academic writers (see eg Virgo [1999] CLJ 478 at 479; Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 229) but in *Nurdin & Peacock plc v DB Ramsden & Co Ltd* supra Neuberger J was of the view (at 964 and 1273) that the proposition in the text seemed to receive some support from the use of words such as 'material' and 'vital' in the earlier authorities to describe the necessary quality of the mistake which sufficed to create a restitutionary right of recovery.

4 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 408, [1998] 4 All ER 513 at 560, HL, per Lord Hope of Craighead. Where the mistake is a serious one the court may regard the inference that the benefit was conferred under a mistake as being 'irresistible': see *Saronic Shipping Co Ltd v Huron Liberian Co Ltd* [1979] 1 Lloyd's Rep 341 at 364 per Mocatta J.

5 *Kelly v Solari* (1841) 9 M & W 54 at 59 per Parke B; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 399, [1998] 4 All ER 513 at 553, HL, per Lord Hoffmann; *Scottish Equitable plc v Derby* [2000] 3 All ER 793 (affd [2001] EWCA Civ 369, [2001] 3 All ER 818). There is some doubt as to whether or not this rule applies to bills of exchange (see Byles *Bills of Exchange and Cheques* (28th Edn, 2007)) but the cases relied upon in support of this proposition (*Price v Neal* (1762) 3 Burr 1355; *Smith v Mercer* (1815) 6 Taunt 76) were decided prior to *Kelly v Solari* supra so that they must be regarded as being of doubtful authority (see Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 208-209).

6 At one point the courts did insist upon such a requirement (see *Chambers v Miller* (1862) 13 CBNS 125 at 133 per Erle CJ) but it has since been rejected: see *Barclays Bank Ltd v WJ Simms Son and Cooke (Southern) Ltd* [1980] QB 677 at 696, [1979] 3 All ER 522 at 536 per Goff J, relying on cases such as *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL; *Kleinwort, Sons & Co Ltd v Dunlop Rubber Co* (1907) 97 LT 263, HL; *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84.

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### **(3) MISTAKE OF LAW**

#### **36. Mistake of law.**

The long-established common law rule to the effect that a mistake of law did not give rise to a restitutionary claim<sup>1</sup> has now been abrogated by the judiciary<sup>2</sup> with the effect that the law relating to mistakes of fact and mistakes of law has been substantially assimilated<sup>3</sup>. A mistake of law which caused the benefit to be conferred will, in principle, generate a restitutionary claim<sup>4</sup>. In considering whether or not the mistake caused the payment to be made, the courts will apply the 'but for' test<sup>5</sup>, 'possibly coupled with a requirement for a close and direct connection between the mistake and the payment and/or a requirement that the mistake impinges on the relationship between payer and payee'<sup>6</sup>.

1 See eg *Bilbie v Lumley* (1802) 2 East 469; *Brisbane v Dacres* (1813) 5 Taunt 143; *Dixon v Monkland Canal Co* (1831) 5 Wils & S 445; *Henderson v Folkestone Waterworks Co* (1885) 1 TLR 329, DC; and MISTAKE vol 77 (2010) PARA 71. The old rule was the subject of numerous exceptions. Thus a benefit was recoverable where it was paid by a court under a mistake of law (*Re Birkbeck Permanent Benefit Building Society* [1915] 1 Ch 91), paid by the Crown out of the consolidated revenue fund under a mistake of law (*Auckland Harbour Board v R* [1924] AC 318, PC; *Commonwealth of Australia v Burns* [1971] VR 825), paid under a mistake of law by a trustee or a personal representative to a beneficiary (in such a case it could be deducted from future sums payable to the beneficiary so overpaid (see eg *Dibbs v Goren* (1849) 11 Beav 483) although there is no English case in which a direct right of action on the part of the trustee or personal representative has been recognised), paid to an officer of the court under a mistake of law (*Re Condran, ex p James* (1874) 9 Ch App 609; *Re TH Knitwear (Wholesale) Ltd* [1988] Ch 275, [1988] 1 All ER 860, CA), paid as a result of a mistake of foreign law (which is treated as a mistake of fact: *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL), paid subject to an agreement that it should be repaid if in fact it was not due (*Sebel Products Ltd v Comrs of Customs and Excise* [1949] Ch 409, [1949] 1 All ER 729), and where the mistake of law was induced by the payee's fraud, oppression, undue influence or breach of fiduciary relationship (see eg *Rogers v Ingham* (1876) 3 ChD 351 at 355-356, CA, per James LJ, and at 357 per Mellish LJ). In addition the courts in equity were always more willing to allow recovery of a benefit conferred under a mistake of law: see eg *Daniell v Sinclair* (1881) 6 App Cas 181, PC; *Gibbon v Mitchell* [1990] 3 All ER 338, [1990] 1 WLR 1304. A distinction was also drawn between a mistake as to the general law and a mistake as to private rights, with the latter giving rise to a restitutionary claim: see *Cooper v Phibbs* (1867) LR 2 HL 149. The most wide-ranging exception was to be found in the judgment of Lord Denning in *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 at 204, [1960] 1 All ER 177 at 181, PC. These exceptions are now no more than illustrations of the types of case in which a benefit conferred under a mistake of law is recoverable. They are discussed in Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 258-259. Beyond that, these cases are now of little practical significance unless, possibly, the right of recovery which they embody is wider than the right which was recognised by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL (see note 2 infra). For example, the rule in *Re Condran, ex p James* supra is wider because it is not confined to payments made to an officer of the court under a mistake of law. It has been observed that *Kleinwort Benson Ltd v Lincoln City Council* supra did not question the authority of *Re Diplock* [1948] Ch 465, [1948] 2 All ER 318, CA (affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL) so that the restrictions there placed on the right of the beneficiaries to bring a personal claim in equity may have survived: see Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 230-231.

2 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558, [2007] 1 All ER 449. The mistake of law bar had earlier been abrogated by the judiciary in other jurisdictions: eg Canada (*Air Canada v British Columbia* (1989) 59 DLR (4) 161), Australia (*David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, Aust HC), South Africa (*Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* (1992) (4) SA 202) and Scotland (*Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SLT 299, Ct of Sess).

3 The two categories in time may be entirely assimilated but it is too early to tell whether or not the assimilation is complete. The fear of opening the floodgates may incline the courts towards a more restrictive approach in some cases involving a mistake of law. The fear may reveal itself in the defences which are available to a mistake of law claim: see PARA 38 post. See also *Brennan v Bolt Burden* [2004] EWCA Civ 1017, [2005] QB 303.

4 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558, [2007] 1 All ER 449.

5 *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941 at 964, [1999] 1 WLR 1249 at 1273 per Neuberger J.

6 *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941 at 964, [1999] 1 WLR 1249 at 1273 per Neuberger J. Doubts have been expressed about the validity of the 'close and direct connection' requirement: see PARA 35 note 3 ante.

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### 37. Mistake and the development of the law.

A claimant who confers a benefit on the defendant on the basis of a settled understanding of the law which is subsequently departed from by judicial decision is entitled to recover the value of that benefit on the ground that it was transferred under a mistake of law<sup>1</sup>. Equally, a claimant who confers a benefit on the defendant on the basis of a decision of a court (in a case concerning different parties) which is subsequently overruled is entitled to recover the value of the benefit so transferred<sup>2</sup>. However, where the change in the law is introduced subsequently by statute, this will not generally give the claimant a right to recover on the basis of mistake because most statutory changes are only prospective in effect<sup>3</sup>. Where the statute is retrospective in effect the claimant may not have a restitutionary claim to recover the value of any benefit conferred<sup>4</sup> unless the statute itself makes provision for the recovery of benefits conferred within certain limits<sup>5</sup>. Where the law is changed by judicial decision, and the change so introduced is prospective only<sup>6</sup>, then a claimant who confers a benefit on the defendant on the basis of the law as it was before the judicial decision will not be entitled to bring a restitutionary claim on the ground that the benefit was conferred under a mistake<sup>7</sup>. A claimant who confers a benefit at a time at which he knows that he is not liable to confer the benefit but mistakenly believes that he is entitled to get the payment back is entitled to recover on the basis that the benefit was conferred under a mistake<sup>8</sup>.

1 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 376-384, [1998] 4 All ER 513 at 533-540, HL, per Lord Goff of Chieveley, at 401 and 554-555 per Lord Hoffmann, and at 414-415 and 566-567 per Lord Hope of Craighead. The suggestion that the rule that money paid under a mistake of law could be recovered did not extend to tax paid under a mistake of law (see *Kleinwort Benson Ltd v Lincoln City Council* supra at 381-382 and 537-538 per Lord Goff of Chieveley; *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL) was rejected in *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49 at [18]-[19], [23], [2007] 1 AC 558 at [18]-[19], [23], [2007] 1 All ER 449 at [18]-[19], [23] per Lord Hoffmann, at [56] per Lord Hope of Craighead, at [83] per Lord Scott of Foscote and at [132]-[135], [141] per Lord Walker of Gestingthorpe.

2 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 376-384, [1998] 4 All ER 513 at 533-540, HL, per Lord Goff of Chieveley, at 401 and 554-555 per Lord Hoffmann, and at 414-415 and 566-567 per Lord Hope of Craighead. The position is probably otherwise where the claimant is the party who was required to pay pursuant to the order of the court in the decision which has now been overruled. Such a party is not entitled to recover the money so paid because it was paid under a court order: see *Kleinwort Benson Ltd v Lincoln City Council* supra at 410 and 562 per Lord Hope of Craighead. Lord Goff of Chieveley and Lord Hoffmann did not expressly consider this point. Lord Browne-Wilkinson and Lord Lloyd would deny recovery in such a case on the basis that the claimant was not mistaken so there may be a majority against recovery in such a case. Alternatively it could be argued that the claimant is not entitled to recover in such a situation because the matter is res judicata.

3 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 381, [1998] 4 All ER 513 at 537, HL, per Lord Goff of Chieveley, at 400 and 554 per Lord Hoffmann, and at 410 and 562 per Lord Hope of Craighead. As to the effect of statutory amendments see further STATUTES vol 44(1) (Reissue) PARA 1283 et seq.

4 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 400, [1998] 4 All ER 513 at 554, HL, per Lord Hoffmann, and at 410 and 562 per Lord Hope of Craighead. However, Lord Goff of Chieveley was of the view that such an action would not lie: see *Kleinwort Benson Ltd v Lincoln City Council* supra at 381 and 537.

5 See eg *Comr of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51.

6 See eg *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL. When the courts are interpreting statute, the judgment cannot apply only prospectively apart from in wholly exceptional cases: see *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2005] UKHL 41 at [38], [2005] 2 AC 680 at [38], [2005] 4 All ER 209 at [38] per Lord Nicholls of Birkenhead ('the interpretation the court gives an Act of Parliament is the meaning which, in legal concept, the statute has borne from the very day it went onto the statute book. So, it is said, when your Lordships' House rules that a previous decision on the interpretation of a statutory provision was wrong, there is no question of the House changing the law. The House is doing no more than correct an error of interpretation. Thus, there should be no question of the House overruling the previous decision with prospective effect only. If the House were to take that course it would be sanctioning the continuing misapplication of the statute so far as existing transactions or past events are concerned. The House, it is said, has no power to do this. Statutes express the intention of Parliament. The courts must give effect to that intention from the date the legislation came into force. The House, acting in its judicial capacity, must give effect to the statute and it must do so in

accordance with what it considers is the proper interpretation of the statute. The House has no suspensive power in this regard').

7 The claimant may, however, be entitled to recover on some other basis: see eg *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL.

8 *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249 per Neuberger J. Where the claimant informs the defendant of his understanding that the money will be recoverable if it is found not to have been due, the court may be able to infer the existence of an agreement under which the money paid will be recoverable. But, even in the absence of such an agreement, it would appear, on the basis of *Nurdin & Peacock plc v DB Ramsden & Co Ltd* supra that the claimant can recover the money paid provided it was paid in the mistaken belief that it could be recovered. The proposition has attracted some criticism: see Virgo [1999] CLJ 478.

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## (4) DEFENCES

### 38. Defences.

A claim to recover a benefit which has been conferred under a mistake, whether of fact or of law<sup>1</sup>, may fail where the payer 'intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend'<sup>2</sup>. A claim may also fail where 'the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt'<sup>3</sup>. More broadly, a defendant who can show that he was entitled to the benefit will not be required to make restitution<sup>4</sup>. The claim may also fail where the defendant can establish the defence of change of position<sup>5</sup> or some other established defence to a restitutionary claim<sup>6</sup>. It is no defence that the defendant honestly believed, when he learned of the payment or transfer to him, that he was entitled to receive and retain the money or property<sup>7</sup>. Equally, the fact that the transaction which has been entered into under the mistake has been fully executed does not operate as a defence to an action to recover the value of a benefit conferred in the performance of that transaction<sup>8</sup>. There may be a defence of settlement of (or submission to) an honest claim<sup>9</sup>. Similarly, recovery will be denied where there has been a compromise of a disputed claim<sup>10</sup>.

1 As to mistake of fact see PARAS 33-35 ante; and as to mistake of law see PARAS 36-37 ante. See further MISTAKE.

2 *Barclays Bank Ltd v WJ Simms Son and Cooke (Southern) Ltd* [1980] QB 677 at 695, [1979] 3 All ER 522 at 535 per Goff J. This proposition is founded on a dictum of Parke B in *Kelly v Solari* (1841) 9 M & W 54 at 59. The words 'or is deemed in law so to intend' have been added to accommodate the case of *Morgan v Ashcroft* [1938] 1 KB 49, [1937] 3 All ER 92, CA.

3 *Barclays Bank Ltd v WJ Simms Son and Cooke (Southern) Ltd* [1980] QB 677 at 695, [1979] 3 All ER 522 at 535 per Goff J. This proposition is founded on *Aiken v Short* (1856) 1 H & N 210 and *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJB 465, HL, and is further supported by *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] QB 110, [1999] 1 All ER (Comm) 8, CA.

4 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 407-408, [1998] 4 All ER 513 at 560, HL, per Lord Hope of Craighead. This defence overlaps with, but appears to be broader than, the defence that good consideration was provided for the conferral of the benefit. It is broader in that it suffices for the defendant to show that he was entitled to the money; he is not required to prove, for example, that the payment was effective to discharge a debt which was owed to him. It may be that the operation of this defence will depend upon the nature of the claim which is being brought. If the claim is one to recover a benefit conferred on the

ground that it was not due, then the defendant should be entitled to defend the claim by proving that it was, in fact, due.

5 *Barclays Bank Ltd v WJ Simms Son and Cooke (Southern) Ltd* [1980] QB 677 at 695, [1979] 3 All ER 522 at 535 per Goff J. The defence of change of position was formally recognised by the House of Lords in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL. As to the defence of change of position see PARAS 166-169 post.

6 Such as estoppel: see eg *Avon County Council v Howlett* [1983] 1 All ER 1073, [1983] 1 WLR 605, CA. As to estoppel see PARA 170 post; and ESTOPPEL. As to defences generally see further PARA 165 et seq post.

7 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 384-385, [1998] 4 All ER 513 at 541-543, HL, per Lord Goff of Chieveley, and at 413-414 and 565-566 per Lord Hope of Craighead. In so concluding their Lordships rejected the analysis of Brennan J in the High Court of Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 398-399, Aust HC.

8 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 385-387, [1998] 4 All ER 513 at 541-543, HL, per Lord Goff of Chieveley, and at 415-416 and 567-568 per Lord Hope of Craighead. This proposition follows from the fact that the state of mind of the claimant must be examined at the time at which the benefit was transferred, not any later point in time.

9 In *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL, their Lordships were careful to say that the defence was not in issue (see Lord Goff of Chieveley at 382 and 538, and Lord Hope of Craighead at 412-413 and 565). The defence has the potential to render the right of recovery a very narrow one, particularly if (as has been suggested in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1993) 175 CLR 353 at 371, Aust HC, per Mason CJ, Deane J, Toohey J, Gaudron J and McHugh J) a case such as *Bilbie v Lumley* (1802) 2 East 469 is an example of the operation of the defence. For cases which appear to support the existence of such a defence see eg *Moore v Fulham Vestry* [1895] 1 QB 399, CA; *Longridge v Dorville* (1821) 5 B & Ald 117.

10 *Callisher v Bischoffsheim* (1870) LR 5 QB 449, DC; *Cook v Wright* (1861) 1 B & S 559; *Llewellyn v Llewellyn* (1845) 3 Dow & L 318; *Haigh v Brooks* (1839) 10 Ad & El 309; *Longridge v Dorville* (1821) 5 B & Ald 117; *Marriott v Hampton* (1797) 2 Esp 546; *Brown v M'Kinnally* (1795) 1 Esp 279.

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## (5) PROPRIETARY CLAIMS

### 39. Proprietary claims.

Where money is paid to a defendant under a mistake of fact<sup>1</sup> (or, possibly, a mistake of law<sup>2</sup>) and the defendant was aware of the mistake at the time at which the money was paid, the claimant may be able to bring a proprietary claim against the defendant to recover the money so paid<sup>3</sup>. This may be so even where the defendant was unaware of the mistake<sup>4</sup> provided that the money can still be identified in the hands of the defendant. In the latter case it may also be necessary for the claimant to show that the mistake was fundamental<sup>5</sup>.

1 As to mistake of fact see PARAS 33-35 ante. As to mistake generally see MISTAKE.

2 As to mistake of law see PARAS 36-37 ante.

3 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 715, [1996] 2 All ER 961 at 977, HL, per Lord Browne-Wilkinson.

4 *Chase-Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, [1979] 3 All ER 1025; *R v Shadrock-Cigari* [1988] Crim LR 465, CA. Whether the decision of Goulding J in *Chase-Manhattan Bank NA v Israel-British Bank (London) Ltd* supra is correct is a matter of some doubt. The case was referred to without expressing an opinion as to whether or not it had been correctly decided in *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74 at 103, [1994] 2 All ER 806 at 826, PC; and it was also referred to without

disapproval in *Friends' Provident Life Office v Hillier Parker May & Rowden (a firm)* [1997] QB 85 at 105-106, [1995] 4 All ER 260 at 274-275, CA, per Auld LJ. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL, Lord Goff of Chieveley left this question open (at 690 and 974), while Lord Browne-Wilkinson (at 715 and 997) expressed his reservations about the decision. However, it has been argued (see Friedmann (1999) 115 LQR 195) that *Chase-Manhattan Bank NA v Israel-British Bank (London) Ltd* supra finds support from the decision of the House of Lords in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL. See further McCormack 'Mistaken Payments and Proprietary Claims' [1996] Conv 86.

5 le on the ground that it is only fundamental mistakes which are sufficiently serious to vitiate the claimant's intention that title should pass to the defendant: see *Cundy v Lindsay* (1878) 3 App Cas 459, HL; *Barclays Bank Ltd v WJ Simms Son and Cooke (Southern) Ltd* [1980] QB 677, [1979] 3 All ER 522; para 34 ante; and *MISTAKE*.

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## **(6) IMPROVEMENTS, CONTRACTS AND MISREPRESENTATIONS**

### **40. Improvements.**

A claimant who carries out improvements to a chattel<sup>1</sup> or to land<sup>2</sup> which belongs to the defendant in the mistaken belief that he is or will become<sup>3</sup> the owner of the chattel or the land may be entitled to bring a restitutionary claim<sup>4</sup> against the defendant to recover the value of the enrichment<sup>5</sup> which the defendant has obtained as a result of the work carried out by the claimant<sup>6</sup>. The claimant may be entitled to recover either the increase in value of the defendant's chattel or land which is attributable to the improvement carried out by the claimant or the reasonable value of the services or work carried out by the claimant. The courts have also been prepared, where appropriate, to award the improver an equitable lien over the land to secure the sum due to the improver<sup>7</sup>.

1 See eg *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA; *Thomas v Robinson* [1977] 1 NZLR 385; *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303.

2 This may be so at least where the defendant knew that the claimant was mistaken and failed to disabuse him of his mistake: see eg *Unity Joint-Stock Mutual Banking Association v King* (1858) 25 Beav 72; *Ramsden v Dyson* (1866) LR 1 HL 129; *Wilmott v Barber* (1880) 15 ChD 96; *Plimmer v City of Wellington Corp'n* (1884) 9 App Cas 699; *Inwards v Baker* [1965] 2 QB 29, [1965] 1 All ER 446, CA; *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA; *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133n, [1981] 1 All ER 897; *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 3 All ER 577, CA; *A-G of Hong Kong v Humphreys Estate (Queen's Garden)* [1987] AC 114, [1987] 2 All ER 387, PC; *Blue Haven Enterprises v Tully* [2006] UKPC 17, [2006] 4 LRC 658.

3 This type of claim is more difficult to rationalise in restitutionary terms because the claimant has not made a mistake as to an existing fact but has made a misprediction and mispredictions do not generally give rise to restitutionary claims. An example of such a claim is *Ramsden v Dyson* (1866) LR 1 HL 129. The fact that mistake is not an essential element in such a claim has been judicially acknowledged: *Holiday Inns Inc v Broadhead* (1974) 232 Estates Gazette 951, cited by Chadwick LJ in *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 392, [2000] 2 All ER 117 at 133, CA.

4 In addition the improver who is sued in tort by the owner of the chattel may have a passive claim in the sense that he can bring his expenditure into account in order to reduce the extent of the claim against him: see the Torts (Interference with Goods) Act 1977 s 6(1); and TORT vol 45(2) (Reissue) PARA 623.

5 The claimant must show that the defendant was enriched in accordance with one of the tests in PARA 11 et seq ante.

6 Alternatively, the claimant may be able to protect his expectation interest (as in *Dillwyn v Llewelyn* (1862) 4 De GF & J 517) or his reliance interest.

<sup>7</sup> *Unity Joint-Stock Mutual Banking Association v King* (1858) 25 Beav 72. This is controversial: see Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 242-243.

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#### 41. Other services.

A claimant who mistakenly discharges another's contractual or statutory duty may be entitled to recover from that person for the liability which has been so discharged<sup>1</sup>. Where the claimant performs some other service for the defendant while labouring under a mistake, where the claimant would have charged for the performance of the service had he known the true position and the defendant has been enriched by the performance of the service, then the claimant should be entitled to bring a restitutionary claim against the defendant<sup>2</sup>.

<sup>1</sup> *Corpn of the County of Carleton v Corpn of the City of Ottawa* [1965] SCR 663.

<sup>2</sup> *Upton-on-Severn RDC v Powell* [1942] 1 All ER 220, CA, although the case has been criticised (see Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 249-250; Burrows *The Law of Restitution* (2nd Edn, 2002) pp 166-167).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/2. MISTAKE/(6) IMPROVEMENTS, CONTRACTS AND MISREPRESENTATIONS/42. Contracts entered into under a mistake.

#### 42. Contracts entered into under a mistake.

Where the parties have entered into a contract as a result of a mistake it is not possible to obtain restitution of benefits conferred under that contract unless and until the contract has been set aside<sup>1</sup>. A mistake which is sufficiently fundamental to justify setting aside a contract at law renders the contract void<sup>2</sup> with the consequence that the value of the benefits conferred under the agreement are recoverable<sup>3</sup>.

<sup>1</sup> As to whether or not a mistake is sufficient to justify setting aside a contract see CONTRACT vol 9(1) PARAS 703-708, 888 et seq. As to mistake generally see MISTAKE. In *Bell v Lever Bros Ltd* [1932] AC 161, HL, the claimants could not have brought a restitutionary claim to recover the money which they had paid to the defendants. Had they been able to do so the effect of such a restitutionary claim would have been to undermine the contractual rules. See also *Bank of Credit and Commerce International SA (in liquidation) v Ali* [1999] 2 All ER 1005, [1999] ICR 1068. See also *Strickland v Turner* (1852) 7 Exch 208; *Pritchard v Merchant's and Tradesman's Mutual Life Assurance Society* (1858) 3 CBNS 622. In *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA, Denning LJ proposed that a contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault. This approach was followed in *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875; *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507, [1969] 2 All ER 891, CA; *Lawrence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128. A rather more cautious approach was adopted in *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 at 951-952, [1994] 1 WLR 1016 at 1034-1035, CA, per Hoffmann LJ, and at 919 and 1042 per Evans LJ; *Clarion Ltd v National Provident Institution* [2000] 2 All ER 265, [2000] 1 WLR 1888. However, the Court of Appeal has rejected the conclusion that there are two categories of mistake, one rendering the contract void at law and the other rendering the contract voidable in equity, and has concluded that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law: see *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, *The Great Peace* [2002] EWCA Civ 1407 at [153]-[160], [2003] QB 679 at [153]-[160], [2002]

4 All ER 689 at [153]-[160] per Lord Phillips of Worth Matravers MR (disapproving *Solle v Butcher* supra; *Magee v Pennine Insurance Co Ltd* supra). See further MISTAKE vol 77 (2010) PARAS 8, 53.

2 See *Bell v Lever Bros Ltd* [1932] AC 161, HL; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255; *Brennan v Bolt Burdon (a firm)* [2004] EWCA Civ 1017, [2005] QB 303. As to void contracts see further CONTRACT vol 9(1) (Reissue) PARA 836 et seq.

3 See the cases cited in note 1 supra.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/2. MISTAKE/(6) IMPROVEMENTS, CONTRACTS AND MISREPRESENTATIONS/43. Misrepresentation.

### 43. Misrepresentation.

Where a contract has been entered into as a result of a misrepresentation made by the defendant and the claimant is entitled to and does set aside or rescind the contract<sup>1</sup>, the claimant is entitled to recover the value of any benefits conferred on the defendant in performance of the contract prior to it being set aside<sup>2</sup> provided that the claimant is in a position to restore to the defendant any benefit which the claimant has obtained under the contract<sup>3</sup>.

1 As to whether or not a misrepresentation entitles the claimant to set aside the contract see CONTRACT vol 9(1) (Reissue) PARA 767; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 783. As to misrepresentation generally see MISREPRESENTATION AND FRAUD. To the extent that rescission of an executed contract operates to re-vest proprietary rights to goods or land transferred under the contract (as in the case of *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, [1964] 1 All ER 290, CA) it can be said that it is a restitutionary proprietary remedy.

2 See eg *Redgrave v Hurd* (1881) 20 ChD 1, CA. The claimant may, of course, be entitled to other non-restitutionary remedies, such as an award of damages under the Misrepresentation Act 1967 s 2(1): see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 801, 811.

3 See eg *Newbigging v Adam* (1886) 34 ChD 582, CA; *Whittington v Seale-Hayne* (1900) 82 LT 49. In other words, there must be 'a giving back and a taking back on both sides': *Newbigging v Adam* supra at 595 per Bowen LJ. At law the claimant must be in a position to make precise counter-restitution but a more flexible approach is taken in equity where it is possible for the claimant to make a money allowance where precise counter-restitution is not possible: see eg *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL; *Crystal Palace FC (2000) Ltd v Dowie* [2007] EWHC 1392 (QB), [2007] IRLR 682.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(1) INTRODUCTION/44. In general.

## 3. DURESS, UNDUE INFLUENCE AND INEQUALITY

### (1) INTRODUCTION

#### 44. In general.

Where a contract is set aside, a claim in restitution may lie. A contract may be voidable on the ground that a party entered into it under duress<sup>1</sup> or undue influence<sup>2</sup> or that it constitutes a harsh and unconscionable bargain<sup>3</sup>. The concept of duress includes not only duress to persons<sup>4</sup>, but also duress of goods<sup>5</sup>, compulsion of legal process<sup>6</sup>, duress 'under colour of office'<sup>7</sup> and economic duress<sup>8</sup>. The concept of undue influence, developed in the courts of equity, encompasses both actual undue influence<sup>9</sup> (namely, a form of illegitimate pressure, akin to

duress) and presumed undue influence<sup>10</sup> (arising from the nature of the relationship between the parties). Where a contract is set aside on such a ground, the coerced party will have a claim in restitution to recover the value of any benefits conferred pursuant to the transaction. However, unless and until the contract is set aside, it remains binding and any money paid under it cannot be recovered in restitution<sup>11</sup>.

1 As to duress see PARAS 45-51 post. See also CONTRACT vol 9(1) (Reissue) PARA 709 et seq; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 25; EQUITY vol 16(2) (Reissue) PARA 436.

2 As to undue influence see PARAS 52-56 post. See also CONTRACT vol 9(1) (Reissue) PARA 712 et seq; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq.

3 As to unconscionable bargains see PARA 57 post. See also CONTRACT vol 9(1) (Reissue) PARA 716; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 854 et seq.

4 See PARA 45 post.

5 See PARA 46 post.

6 See PARA 47 post.

7 See PARA 48 post.

8 See PARA 49 post.

9 See PARA 53 post.

10 See PARAS 54-55 post.

11 *Dimskal Shipping Co SA v International Transport Workers' Federation, The Evia Luck* [1992] 2 AC 152 at 165, [1991] 4 All ER 871 at 878, HL, per Lord Goff of Chieveley; *Enimont Overseas AG v Jugotanker Zadar, The Olib* [1991] 2 Lloyd's Rep 108 at 118.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(2) DURESS/45. Duress to persons.

## (2) DURESS

### 45. Duress to persons.

Where a contract is set aside on the ground of duress, a claim in restitution may lie. Duress to persons was originally the only category of duress which was regarded as sufficient to qualify for relief<sup>1</sup>. Actual or threatened violence to the person will constitute duress<sup>2</sup>. In addition to such violence being directed against the claimant in person, it will also be sufficient if it is directed against the claimant's spouse, child or other close relative<sup>3</sup>. The person subject to the duress is entitled to relief even though he might have entered into the contract if the defendant had not made any threat to induce him to do so; it is for the person making the threat to establish that the threat contributed nothing to the other's decision to enter into the contract<sup>4</sup>.

1 *Skeate v Beale* (1841) 11 Ad & El 983. As to duress rendering a contract voidable see CONTRACT vol 9(1) (Reissue) PARA 709 et seq.

2 See *Scott (falsely called Sebright) v Sebright* (1886) 12 PD 21; *Hussein v Hussein* [1938] P 159, [1938] 2 All ER 344; *Barton v Armstrong* [1976] AC 104, [1975] 2 All ER 465, PC. See also *R v A-G for England and Wales* [2003] UKPC 22, [2004] 1 LRC 132 (threat of demotion).

3 *Williams v Bayley* (1866) LR 1 HL 200 (son); *Seear v Cohen* (1881) 45 LT 589 (nephew); *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173, CA (mother-in-law and brother-in-law); *Kaufman v Gerson* [1904] 1 KB 591, CA.

4 *Barton v Armstrong* [1976] AC 104 at 119, 121, [1975] 2 All ER 465 at 475, 476, PC; cf *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 at 638-639 per Mance J, in relation to the question of the burden of proof in cases of duress.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(2) DURESS/46. Duress of goods.

#### 46. Duress of goods.

Money paid under duress of goods (namely, the wrongful seizure of personal property) may be recovered if the claimant can show that he had title to, or the right to possession of, the goods<sup>1</sup>. It is sufficient that the defendant threatened (and did not in fact effect) wrongful seizure of the goods<sup>2</sup>. The principle has been applied to documents representing choses or things in action, such as insurance policies<sup>3</sup>, and documents of title, such as deeds<sup>4</sup> (and, indeed, to the seizure of land itself<sup>5</sup>). It has also been applied in the cases of money paid to prevent a wrongful sale by a mortgagee<sup>6</sup> and a wrongful lien exercised in respect of a ship<sup>7</sup>.

1 *Astley v Reynolds* (1731) 2 Stra 915; *Close v Phipps* (1844) 7 Man & G 586; *Fraser v Pendlebury* (1861) 31 LJCP 1; *Fell v Whittaker* (1871) LR 7 QB 120. As to duress rendering a contract voidable see CONTRACT vol 9(1) (Reissue) PARA 709 et seq.

2 *Snowdon v Davis* (1808) 1 Taunt 359; *Valpy v Manley* (1845) 1 CB 594; *Maskell v Horner* [1915] 3 KB 106 at 120, CA, per Lord Reading CJ.

3 *Shaw v Woodcock* (1827) 7 B & C 73.

4 *Pratt v Vizard* (1833) 5 B & Ad 808; *Wakefield v Newbon* (1844) 6 QB 276; *Oates v Hudson* (1851) 6 Exch 346; *Fraser v Pendlebury* (1861) 31 LJCP 1.

5 *Dooli Chand v Ram Kishen Singh* (1881) LR 8 Ind App 93; *Kanhaya Lal v National Bank of India* (1913) 29 TLR 314, PC.

6 *Close v Phipps* (1844) 7 Man & G 586.

7 *Somes v British Empire Shipping Co* (1860) 8 HL Cas 338.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(2) DURESS/47. Compulsion of legal process.

#### 47. Compulsion of legal process.

Money paid under compulsion of properly applied legal process cannot be recovered in a claim for restitution<sup>1</sup>. Thus money paid in pursuance of a judgment is not recoverable, even if it was paid under a mistake of fact and the judgment was obtained fraudulently, unless and until the judgment has been set aside<sup>2</sup>. The rule that such money cannot be recovered back applies to money paid by mistake under compulsion of a magistrates' court summons which is subsequently withdrawn<sup>3</sup>, and to money paid under compulsion of an excessive distress for rent<sup>4</sup>, and it is immaterial in such cases that the money is paid under protest<sup>5</sup>.

However, where pressure is exerted by the improper application of legal process, a transaction induced by the pressure will be liable to be set aside and money paid under the pressure is

recoverable in restitution<sup>6</sup>. This principle has also been applied in cases involving wrongful threats of criminal proceedings<sup>7</sup>, of wrongful arrest<sup>8</sup> and proceedings brought, or threatened, in bad faith<sup>9</sup>. Moreover, where a person seeks to take advantage of legal proceedings to exert pressure on another on a matter unconnected with the subject-matter of the proceedings, money paid pursuant to that pressure will be recoverable, because the proceedings are an abuse of the process of the court<sup>10</sup>.

1 *Marriot v Hampton* (1797) 7 Term Rep 269; *Hamlet v Richardson* (1833) 9 Bing 644; *Powell v Hoyland* (1851) 6 Exch 67; *Fisher & Co v Apollinaris Co* (1875) 10 Ch App 297; *Flower v Sadler* (1883) 10 QBD 572, CA; *William Whiteley v R* (1910) 101 LT 741. See also *R v A-G for England and Wales* [2003] UKPC 22, [2004] 1 LRC 132. Cf the position where there has been a mistake of law: see PARA 37 ante.

2 *De Medina v Grove* (1846) 10 QB 152; *Huffer v Allen* (1866) LR 2 Exch 15; *Marriot v Hampton* (1797) 7 Term Rep 269.

3 *Moore v Fulham Vestry* [1895] 1 QB 399, CA. See also *Ward & Co v Wallis* [1900] 1 QB 675, where a claimant by mistake gave the defendant credit for a payment on account which had not been made and, the action being settled, it was held that in the special circumstances the claimant could recover because the defendant had not obtained the settlement in good faith.

4 *Skeate v Beale* (1840) 11 Ad & El 983 at 991. The remedy is an action for the excessive distress. At common law the rule applied to wrongful distress damage feasant: *Lindon v Hooper* (1776) 1 Cowp 414; *Gulliver v Cosens* (1845) 1 CB 788.

5 *Gulliver v Cosens* (1845) 1 CB 788.

6 *Newdigate v Davy* (1693) 1 Ld Raym 742; *Pitt v Coomes* (1835) 2 Ad & El 459; *Clark v Woods* (1848) 2 Exch 395.

7 *Williams v Bayley* (1866) LR 1 HL 200; *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469 at 477 per Fry J; *Kaufman v Gerson* [1904] 1 KB 591, CA; *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389, [1937] 2 All ER 657. In the latter case, it was stated by Porter J (at 395 and 661-662) that no direct threat was necessary, nor need any promise be given to abstain from prosecution: 'It is enough if the undertaking were given owing to a desire to prevent a prosecution and that desire were known to those to whom the undertaking was given'.

8 *Oughton v Seppings* (1830) 1 B & Ad 241; *Duke de Cadaval v Collins* (1836) 4 Ad & El 858 at 864 per Denman CJ; *Baron De Mesnil v Dakin* (1867) LR 3 QB 18 at 23-24 per Cockburn CJ.

9 *Scott (falsely called Sebright) v Sebright* (1866) 12 PD 21.

10 *Unwin v Leaper* (1840) 1 Man & G 747; *Goodall v Lowndes* (1844) 6 QB 464 at 467 per Lord Denman CJ.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(2) DURESS/48. Duress 'under colour of office'.

#### **48. Duress 'under colour of office'.**

Where a claimant pays money to a public officer in response to a demand for payment to which he is not entitled, or for more than he is entitled to, for the performance of his public duty<sup>1</sup>, such money (or the excess over the sum due) is recoverable in restitution<sup>2</sup>. It is presently unclear whether this line of authority retains an independent existence or whether the rule has been subsumed within the wider principle that where parties are on an unequal footing so that money is paid by way of tax or other impost in pursuance of a demand by some public officer, the monies are recoverable since the citizen is, in practice, unable to resist the payment save at the risk of breaking the law or exposing himself to penalties or other disadvantages<sup>3</sup>. Reliance on this principle has significant advantages for a claimant, in particular in that it is not

necessary to establish illegitimate pressure on the part of a public authority, but merely the fact of a payment pursuant to an ultra vires demand<sup>4</sup>.

The right of recovery has been extended beyond cases involving demands by those holding actual public office to situations where the defendant is in a quasi-public or monopolistic position and demands a payment, to which it is not entitled, for the fulfilment of a duty which it owes<sup>5</sup>.

1 This is known as 'payment under colour of office' or 'colore officii'.

2 *Lovell v Simpson* (1800) 3 Esp 153 (bailiff demanded excessive fee on giving bail); *Morgan v Palmer* (1824) 2 B & C 729 (mayor required illegal fee for renewal of licence); *Steele v Williams* (1853) 8 Exch 625 (parish clerk illegally charged for taking extracts from parish register); *Hooper v Exeter Corp* (1887) 56 LJQB 457 (harbour dues); *Queen of the River Steamship Co v Conservators of the River Thames* (1899) 15 TLR 474 (tolls on a ship); *Mason v State of New South Wales* (1959) 102 CLR 108 at 140, Aust HC, per Windeyer J.

3 *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 198, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 781, HL, per Lord Browne-Wilkinson; and see PARA 58 post. However, Lord Slynn of Hadley merely expressed the view (at 204 and 787) that there was some overlap between the colour of office cases and the principle in *Woolwich Equitable Building Society v IRC* supra; and the other members of the House of Lords did not indicate that the colour of office cases were merely instances of the application of the principle in *Woolwich Equitable Building Society v IRC* supra.

4 See *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 173, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 760, HL, per Lord Goff of Chieveley, where he said that since the possibility of duress by the Inland Revenue was very remote, the concept of compulsion would have to be stretched to the utmost to embrace the circumstances of a case such as this; and see PARA 58 post.

5 *Re Coombs and Freshfield and Fernley* (1850) 4 Exch 839 (arbitrator fixing own fee without jurisdiction); *Great Western Ry Co v Sutton* (1869) LR 4 HL 226 (common carrier demanding larger sum than reasonable for performance of duty of carriage); *South of Scotland Electricity Board v British Oxygen Co Ltd (No 2)* [1959] 2 All ER 225, [1959] 1 WLR 587, HL (alleged overcharging for high voltage electricity).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(2) DURESS/49. Economic duress.

#### 49. Economic duress.

Where a contract is set aside on the ground of duress, a claim in restitution may lie. It is now accepted law that economic pressure may be sufficient to amount to duress, provided that the pressure may be characterised as illegitimate and has constituted a significant cause inducing the claimant to enter into the relevant contract or to make a payment<sup>1</sup>. However, it is necessary to distinguish illegitimate commercial pressure from legitimate commercial pressure, because commercial pressure is to some degree present wherever one party to a commercial transaction is in a stronger bargaining position than the other party<sup>2</sup>. In determining whether the pressure is illegitimate, the court will have particular regard to the nature of the pressure. If the defendant threatens unlawful action, such as a crime or a tort, the pressure will be regarded as illegitimate<sup>3</sup>. The question whether a threat to break a contract will be illegitimate is more difficult. Where the defendant threatens not to perform his part of the contract, knowing that this will amount to a breach of the contract, the threat may be characterised as illegitimate<sup>4</sup>.

Where a claimant agrees to pay a defendant more than had originally been contracted for in order to obtain the defendant's performance under the contract, the question whether the court will enforce the promise is likely to depend on the presence or absence of economic duress. In the absence of such duress, provided that there is some practical benefit to the claimant, the court is likely to enforce the agreement<sup>5</sup>. However, where a claimant enters into a

contract or confers a benefit because of the defendant's threat not to contract with him in the future or to rely on its strict legal rights, the threat will generally not be regarded as illegitimate and the claimant will be unable to set aside the transaction or succeed in a claim for restitution in respect of the benefit conferred<sup>6</sup>.

The claimant must establish not only that the threat in question was illegitimate, but also that it constituted a significant cause in him entering into the contract or conferring the benefit in question<sup>7</sup>. Some of the earlier cases on economic duress suggested that the test was whether the victim's will had been 'overborne'<sup>8</sup>. However, the leading case recognises that the typical case of duress involves a choice to submit to the demand or threat rather than suffer the consequences<sup>9</sup>. It is the lack of a practical or reasonable alternative which is the most important factor in determining whether the claimant entered into the contract or conferred the benefit in question because of the pressure<sup>10</sup>. It will also be relevant to consider whether the claimant made a protest at the time of submitting to the pressure<sup>11</sup>.

1 *Occidental Worldwide Investment Corp'n v Skibs A/S Avanti, Skibs A/S Glarona, Skibs A/S Navalis, The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705, [1978] 3 All ER 1170; *Pao On v Lau Yiu Long* [1980] AC 614, [1979] 3 All ER 65, PC; *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090 at 1140, [1979] 3 All ER 700 at 729, HL, per Lord Scarman; *Universe Tankships Inc of Monrovia v International Transport Workers' Federation, The Universe Sentinel* [1983] 1 AC 366 at 383-384, [1982] 2 All ER 67 at 75-76, HL, per Lord Diplock, and at 400-401 and 88-89 per Lord Scarman; *Dimskal Shipping Co SA v International Transport Workers' Federation, The Evia Luck* [1992] 2 AC 152 at 165, [1991] 4 All ER 871 at 878, HL, per Lord Goff of Chieveley. See also CONTRACT vol 9(1) (Reissue) PARA 711.

2 *Universe Tankships Inc of Monrovia v International Transport Workers' Federation, The Universe Sentinel* [1983] 1 AC 366 at 384, [1982] 2 All ER 67 at 76, HL, per Lord Diplock.

3 *Universe Tankships Inc of Monrovia v International Transport Workers' Federation, The Universe Sentinel* [1983] 1 AC 366 at 401, [1982] All ER 67 at 89, HL, per Lord Scarman. Although Lord Scarman dissented on the application of the law to the facts (whether the threat in question was illegitimate), the House of Lords was unanimous in relation to the general requirements of economic duress.

4 See eg *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, 128 Sol Jo 279, CA, where the claimant had agreed to erect exhibition stands for the defendants for a fixed price. The claimant's employees threatened to strike unless they were paid additional sums. The claimant told the defendant that if it paid the sums in question, the claimant would complete the contract. The defendant subsequently deducted the additional payment from the overall contract sum and the claimant sued unsuccessfully to recover it. The Court of Appeal held that the claimant had made a veiled threat that it would breach the contract unless the defendant paid the extra sum, that the defendant had been influenced against its will to pay money under the threat of unlawful damage to its economic interest, that it had no alternative course of action but to pay the sum demanded and that it would have been reasonable for the claimant to have paid the sum demanded by its employees. See also *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705, [1978] 3 All ER 1170 (where Mocatta J held that a threat not to carry out a contract amounted to economic duress, but that the claimant had nevertheless subsequently affirmed the contract); *Vantage Navigation Corp'n v Suhail and Saud Bahwan Building Materials Inc, The Alev* [1989] 1 Lloyd's Rep 138; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833, [1989] 1 All ER 641; *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530; *Carillion Construction Ltd v Felix (UK) Ltd* [2001] BLR 1.

5 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA, where the practical benefit to the claimant main contractor was said to be the advantages of not having to find another sub-contractor and avoiding the payment of penalties for delay under the main contract. In relation to the finding that there was no illegitimate pressure, it was an important factor that there was no threat by the defendant; it was the claimant who had made the offer to pay the additional sum to induce the defendant to proceed with the contract. Cf *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA, where the claimant agreed to accept less than the full amount due pursuant to a contract in response to a threat that unless it accepted that amount the defendant would pay nothing; in permitting the claimant to recover, the Court of Appeal relied on the factor that the defendant was regarded as having placed 'undue pressure' on the claimant (at 624 and 841 per Lord Denning MR). See also *Ferguson v Davies* [1997] 1 All ER 315, CA.

6 *Eric Gnapp Ltd v Petroleum Board* [1949] 1 All ER 980, 93 Sol Jo 338, CA (where the claimant entered into the contract because there was no-one else with whom he could contract for the supply of the particular commodity required); *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, CA (where the defendant, which had a monopoly on the supply of certain brands of cigarettes, had an absolute discretion to withdraw

credit facilities and threatened to do so unless the claimant made payment for goods which had been delivered but subsequently stolen; it was regarded as an important factor that the defendant genuinely believed that the goods were at the claimant's risk); *Alf Vaughan & Co Ltd (in administrative receivership) v Royscot Trust plc* [1999] 1 All ER (Comm) 856 at 863 per Mance J (no illegitimate pressure where the owner of goods, as entitled to do, threatened to repossess them pursuant to the termination of a hire-purchase agreement).

7 *Dimskal Shipping Co SA v International Transport Workers' Federation, The Evia Luck* [1992] 2 AC 152 at 165, [1991] 4 All ER 871 at 878, HL, per Lord Goff of Chieveley. See also *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 at 638 per Mance J; *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530 at [131] per Dyson J.

8 *Occidental Worldwide Investment Corp v Skibbs A/S Avanti, Skibbs A/S Glarona, Skibbs A/S Navalis, The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293 at 336 per Kerr J; *Pao On v Lau Yiu Long* [1980] AC 614 at 635.

9 *Universe Tankships Inc of Monrovia v International Transport Workers' Federation, The Universe Sentinel* [1983] 1 AC 366 at 400, [1982] 2 All ER 67 at 88, HL, per Lord Scarman. See also *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40 at 45-46; *R v A-G for England and Wales* [2003] UKPC 22 at [15]-[20], [2004] 1 LRC 132 at [15]-[20].

10 *Universe Tankships Inc of Monrovia v International Transport Workers' Federation, The Universe Sentinel* [1983] 1 AC 366 at 400, [1982] 2 All ER 67 at 88, HL (no other practical choice open to the claimant); *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 All ER 944 at 960, [1983] 1 WLR 87 at 93 (no realistic alternative but to submit); *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 at 428, 128 Sol Jo 279, CA (where Kerr LJ stated that the consequences of a refusal to comply with the demand must be serious and immediate, so that there is no reasonable alternative open, such as legal redress); *Vantage Navigation Corp v Suhail and Saud Bahwan Building Materials Inc, The Alef* [1989] 1 Lloyd's Rep 138 at 146-147 (no other practical choice); *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 at 638 per Mance J ('relief may perhaps be refused if [the innocent party] conducted himself in a way which showed that, for better or for worse, he was prepared to accept and live with the consequences, however unwelcome').

11 *Universe Tankships Inc of Monrovia v International Transport Workers' Federation, The Universe Sentinel* [1983] 1 AC 366 at 400, [1982] 2 All ER 67 at 88, HL, per Lord Scarman. See also *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, [1978] 3 All ER 1170, where the claimant lost the right to set aside the transaction on the ground of economic duress because, although the claimant agreed to make the increased payment demanded 'without prejudice to its rights', it continued to pay further increased instalments without protest, took possession of the goods without protest and took no further action to recover the additional payments for a further period of seven months. The claimant's conduct was held to amount to an affirmation of the varied agreement to pay the additional sum.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(2) DURESS/50. Submission to an honest claim.

## 50. Submission to an honest claim.

If a claimant, with knowledge of the material facts, pays money demanded by the defendant, which the claimant knows that he is not bound to pay and in circumstances giving rise to the inference that he is paying it voluntarily to close the transaction, provided that the defendant believed in good faith that he was entitled to make the demand, the claimant will be unable to recover it<sup>1</sup>.

<sup>1</sup> *Slater v Burnley Corp* (1888) 59 LT 636; *Maskell v Horner* [1915] 3 KB 106 at 118, CA, per Lord Reading CJ; *Twyford v Manchester Corp* [1946] Ch 236, [1946] 1 All ER 621.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(2) DURESS/51. Proprietary remedies.

## 51. Proprietary remedies.

A claim for the recovery of money paid pursuant to a contract which is avoided for duress will generally be a personal claim. The money will not be regarded as subject to a resulting trust in the defendant's hands<sup>1</sup>. It may be possible for a proprietary claim to be advanced where the pressure is such that property does not pass pursuant to the transaction induced by the pressure<sup>2</sup>.

1 *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366, [1982] 2 All ER 67, HL. On this point, the House of Lords was unanimous. However, there was no general consideration of the question whether proprietary remedies should be available in the case of a claim for restitution on the ground of duress, and the decision may not be of general application. As to resulting trusts see further TRUSTS vol 48 (2007 Reissue) PARA 705 et seq.

2 See Virgo *The Principles of the Law of Restitution* (2nd Edn, 2006) pp 589-590, citing *Duke de Cadaval v Collins* (1836) 4 Ad & El 858.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(3) UNDUE INFLUENCE/52. In general.

### (3) UNDUE INFLUENCE

#### 52. In general.

The concept of undue influence was developed by the courts of equity in response to the limits to the common law notion of duress<sup>1</sup>. It was intended to protect people from being forced, tricked or misled in any way by others into parting with their property<sup>2</sup>. The types of undue influence are<sup>3</sup>:

- 1 (1) actual undue influence, where it is necessary for the claimant to show that the wrongdoer exerted undue influence on the claimant to enter into the particular transaction which it is sought to set aside<sup>4</sup>;
- 2 (2) presumed undue influence in certain protected relationships, where the very nature of the relationship between the parties gives rise to the presumption that undue influence has been exercised, and there is no need to show that actual pressure was exerted<sup>5</sup>.

1 As to undue influence see also CONTRACT vol 9(1) (Reissue) PARA 712 et seq; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq. As to duress see PARAS 45-51 ante; and CONTRACT vol 9(1) (Reissue) PARA 709 et seq; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 23-25; EQUITY vol 16(2) (Reissue) PARA 436.

2 *Allcard v Skinner* (1887) 36 ChD 145 at 183, CA, per Lindley LJ.

3 Prior to the decision in *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449, there was a three-part classification of undue influence: see *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 953, [1992] 4 All ER 955 at 964, CA, per Slade LJ. This classification was adopted by the House of Lords in *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; but its utility was doubted in *Royal Bank of Scotland v Etridge (No 2)* supra at [92] per Lord Clyde, at [105] per Lord Hobhouse of Woodborough, and at [161] per Lord Scott of Foscote.

4 As to actual undue influence see further PARA 53 post.

5 As to presumed undue influence under automatically protected relationships see further PARA 54 post. A further requirement prior to the decision in *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449 was proof of manifest disadvantage, a label which was discarded in that case (see at [29] per Lord Nicholls of Birkenhead). The term has, however, continued to be used: see eg *Abbey National*

*Bank v Stringer* [2006] EWCA Civ 338, (2006) 150 Sol Jo LB 475; *National Westminster Bank v Waite* [2006] EWHC 1287 (QB), [2006] All ER (D) 289 (Jun); *Macklin v Dowsett* [2004] EWCA Civ 904, [2004] 2 EGLR 75.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(3) UNDUE INFLUENCE/53. Actual undue influence.

### 53. Actual undue influence.

The person alleging actual undue influence has the burden of showing that the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant, that the influence was exercised, that its exercise was undue and that its exercise brought about the transaction<sup>1</sup>. There is no requirement that the person alleging actual undue influence should establish that the transaction was to his manifest disadvantage<sup>2</sup>.

There is no all-encompassing definition of the type of pressure which will constitute actual undue influence<sup>3</sup>. It has been held that it amounts to improper pressure or coercion and that there is much overlap with the principle of duress<sup>4</sup>. It has also been more widely defined as an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other; it is typically some express conduct overbearing the other party's will<sup>5</sup>. Examples of the types of situations which may be regarded as constituting actual undue influence include threats to prosecute the son of the complainant<sup>6</sup>, and a husband forcing his wife to sign a joint mortgage over their matrimonial home to secure a loan<sup>7</sup>.

1 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 967, 970-971, [1992] 4 All ER 955 at 976, 978-979, CA, per Slade LJ. See also *Lancashire Loans Ltd v Black* [1934] 1 KB 380, CA; *Goldsworthy v Brickell* [1987] Ch 378 at 400, [1978] 1 All ER 853 at 864, CA. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 841-842.

2 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL (overruling *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA, on this point).

3 In *Allcard v Skinner* (1887) 36 ChD 145 at 183, CA, Lindley LJ stated that no court had ever attempted to define undue influence.

4 See *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [8], [2001] 4 All ER 449 at [8] per Lord Nicholls of Birkenhead.

5 See *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [103], [2001] 4 All ER 449 at [103] per Lord Hobhouse of Woodborough.

6 *Williams v Bayley* (1866) LR 1 HL 200. See also *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389, [1937] 2 All ER 657 (threat to prosecute brother of a director of the complainant company and endangering father's health).

7 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(3) UNDUE INFLUENCE/54. Presumed undue influence: automatically protected relationships.

### 54. Presumed undue influence: automatically protected relationships.

In certain legal relationships one party is legally presumed to repose trust and confidence in the other but there is no presumption that the confidence has been abused; this is a matter of evidence<sup>1</sup>. Where the claimant establishes that there was such a relationship between himself and the defendant, the burden then passes to the defendant to show that the claimant entered into the transaction freely, such as by the receipt of independent advice<sup>2</sup>.

The law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected<sup>3</sup>. The following categories of relationship have been judicially recognised as automatically giving rise to the presumption of undue influence: a parent or other person in the position of a parent exercising influence over a child<sup>4</sup>; a solicitor and his client<sup>5</sup>; a trustee and beneficiary<sup>6</sup>; a doctor and patient<sup>7</sup>; and religious advisers and their followers<sup>8</sup>.

Certain relationships have been held not to fall within the category of automatically protected relationships so as to give rise to the presumption of undue influence without regard to evidence as to the actual nature of the particular relationship<sup>9</sup>.

If the relationship is not one which is normally regarded as giving rise to the presumption of undue influence, but is such that it might over time develop into such a relationship, the nature of the transaction may be sufficient to justify the inference that the relationship has become one of trust and confidence; and where the transaction is so extravagantly improvident that it is virtually inexplicable on any other basis, the inference will be readily drawn<sup>10</sup>.

1 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [13], [2001] 4 All ER 449 at [13] per Lord Nicholls of Birkenhead.

2 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [14], [2001] 4 All ER 449 at [14] per Lord Nicholls of Birkenhead; *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 189, [1993] 4 All ER 417 at 423, HL, per Lord Browne-Wilkinson. See also *Wright v Carter* [1903] 1 Ch 27, CA; *McMaster v Byrne* [1952] 1 All ER 1362, 96 Sol Jo 325, PC; *Tufton v Spemi* [1952] 2 TLR 516, CA; *Zamet v Hyman* [1961] 3 All ER 933, [1961] 1 WLR 1442, CA; *Turkey v Awadh* [2005] EWCA Civ 382, [2005] 2 FCR 7. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 843 et seq.

3 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [18], [2002] 2 AC 773 at [18], [2001] 4 All ER 449 at [18] per Lord Nicholls of Birkenhead. Lord Nicholls describes the presumption generally as 'a shift in the evidential burden of proof' (see at [16]) and contrasts this with the irrebuttable presumption in the particular types of relationships discussed above.

4 *Archer v Hudson* (1844) 7 Beav 551; *Harvey v Mount* (1845) 8 Beav 439; *Wright v Vanderplank* (1856) 8 De GM & G 133; *Bainbrigge v Browne* (1881) 18 ChD 188. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 844-845. A sibling relationship is not included: see *Pesticcio v Huet* (2003) 73 BMLR 57 at [80], [2003] All ER (D) 237 (Apr) at [80] per Neuberger J. Nor is the relationship of aunt and nephew: see *Randall v Randall* [2004] EWHC 2258 (Ch), 7 ITLR 340.

5 *Tomson v Judge* (1855) 3 Drew 306; *Willis v Barron* [1902] AC 271, HL; *Wright v Carter* [1903] 1 Ch 27, CA. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 846.

6 *Hunter v Atkins* (1834) 3 My & K 113; *Plowright v Lambert* (1885) 52 LT 646. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 848.

7 *Ahearne v Hogan* (1844) Drury temp Sug 310. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 849.

8 *Huguenin v Baseley* (1807) 14 Ves 273; *Lyon v Home* (1868) LR 6 Eq 655; *Allcard v Skinner* (1887) 36 ChD 145, CA; *Roche v Sherrington* [1982] 2 All ER 426, [1982] 1 WLR 599. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 849.

9 *Mathew v Bobbins* (1980) 41 P & CR 1, [1980] 2 EGLR 97, CA (employer and employee); *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL (co-habitees). As to husband and wife see *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 850.

10 *Crédit Lyonnais Nederland NV v Burch* [1997] 1 All ER 144 at 154-155, 74 P & CR 384 at 394-395, CA, per Millet LJ; cf *Tufton v Sporni* [1952] 2 TLR 516 at 530, CA, per Jenkins LJ; *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 at 228-229, CA, per Simon Brown LJ, and at 235-236 per Ward LJ.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(3) UNDUE INFLUENCE/55. Rebutting the presumption of undue influence.

### **55. Rebutting the presumption of undue influence.**

One of the most important factors in showing that a person in a relationship which gives rise to the presumption of undue influence acted freely and of his own volition is the provision of independent legal advice to enable him to reach an informed decision about the transaction<sup>1</sup>. However, it is only a factor to be taken into consideration and is not decisive<sup>2</sup>.

1 *Re Coomber* [1911] 1 Ch 723, CA; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL. As to rebuttal of the presumption of undue influence see further MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 852 et seq.

2 See *R v A-G for England and Wales* [2003] UKPC 22, [2004] 1 LRC 132 (member of SAS had to sign confidentiality agreement if he wished to remain a member; absence of legal advice did not affect the fairness of the transaction as the terms of the agreement were clearly explained). See also *Eid v Al-Kazemi* [2004] EWHC 2129 (Ch) at [48] per John Martin QC (sitting as a deputy judge of the High Court) (the taking of independent legal advice was a factor to take into consideration); *Randall v Randall* [2004] EWHC 2258 (Ch) at [38] per Edward Bartley Jones QC (sitting as a deputy judge of the High Court) (the weight, or importance, to be attributed to such advice depends on all the circumstances).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(3) UNDUE INFLUENCE/56. Proprietary remedies.

### **56. Proprietary remedies.**

Where a claimant establishes undue influence and seeks rescission of the transaction as a remedy, he may be able to assert a proprietary remedy on the basis that title in any property transferred reverted in the claimant on the rescission of the transaction<sup>1</sup>.

1 See *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321, CA; *Lonrho plc v Fayed (No 2)* [1991] 4 All ER 961, [1992] 1 WLR 1; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (reversed on other grounds [1994] 2 All ER 685, CA).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/3. DURESS, UNDUE INFLUENCE AND INEQUALITY/(4) UNCONSCIONABLE BARGAINS/57. Relief from unconscionable bargains.

## **(4) UNCONSCIONABLE BARGAINS**

### **57. Relief from unconscionable bargains.**

There is an equitable jurisdiction, separately developed from the concept of undue influence, to give relief against transactions which indicate an unconscientious use of the power<sup>1</sup> arising out of the circumstances and conditions of the contracting parties<sup>2</sup>. It does not depend on the existence of any relationship of trust and confidence or on the exertion of pressure. A transaction may be set aside if it is made by a poor or ignorant person at a considerable undervalue and without the benefit of independent legal advice<sup>3</sup>. It has been said that the following elements must be present in the transaction before the court will interfere: (1) one party has been at a serious disadvantage to the other, whether through poverty, ignorance or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken; (2) this weakness of one party has been exploited by the other in a morally culpable manner; and (3) the resulting transaction has been not merely hard or improvident, but overreaching and oppressive<sup>4</sup>. A judicial attempt to draw a general principle from the numerous particular instances of intervention, on the basis of a principle of 'inequality of bargaining power'<sup>5</sup>, has been resisted by subsequent authorities and cannot be considered to represent the law<sup>6</sup>.

1 As to unconscionable bargains see also CONTRACT vol 9(1) (Reissue) PARA 716; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 854 et seq.

2 *Earl of Aylesford v Morris* (1873) 8 Ch App 484; *Hart v O'Connor* [1985] AC 1000 at 1024, [1985] 2 All ER 880 at 891, PC.

3 *Fry v Lane, Re Fry, Whittet v Bush* (1888) 40 ChD 312 at 322; *Hart v O'Connor* [1985] AC 1000 at 1023-1024, [1985] 2 All ER 880 at 891-892, PC.

4 *Alec Lobb Ltd v Total Oil GB Ltd* [1983] 1 All ER 944 at 961-962, [1983] 1 WLR 87 at 94-95; revsd in part [1985] 1 All ER 303, [1985] 1 WLR 173, CA. See also *Cresswell v Potter* [1978] 1 WLR 255n; *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at 110, [1978] 2 All ER 489 at 501 per Browne-Wilkinson J; *Crédit Lyonnais Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA; *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221, CA.

5 *Lloyds Bank Ltd v Bundy* [1975] QB 326 at 339, [1974] 3 All ER 757 at 765, CA, per Lord Denning MR.

6 *Pau On v Lau Yiu Long* [1980] AC 614 at 634, [1979] 3 All ER 65 at 77, PC; *National Westminster Bank plc v Morgan* [1985] AC 686 at 708, [1985] 1 All ER 821 at 830, HL, per Lord Scarman; *Hart v O'Connor* [1985] AC 1000 at 1023-1024, [1985] 2 All ER 880 at 891-892, PC; *Alec Lobb Ltd v Total Oil GB Ltd* [1983] 1 All ER 944, [1985] 1 WLR 87.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/4. ULTRA VIRES DEMANDS BY A PUBLIC AUTHORITY/58. The scope of the right of recovery.

## 4. ULTRA VIRES DEMANDS BY A PUBLIC AUTHORITY

### 58. The scope of the right of recovery.

Money paid by a subject to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the subject as of right<sup>1</sup>. In order to recover money so paid the claimant is not required to prove that he was mistaken in paying the money<sup>2</sup>, nor that the money was paid as a result of pressure or duress exercised by the public authority<sup>3</sup>. Instead the claimant must prove that there has been payment made pursuant to a demand<sup>4</sup> for tax or some other impost<sup>5</sup> which is ultra vires<sup>6</sup> because of the invalidity of the relevant subordinate legislation<sup>7</sup>.

1 *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL. The ground on which restitution was ordered does not emerge with great clarity from

the speeches of their Lordships in *Woolwich Equitable Building Society v IRC* supra, largely because there were a number of possible grounds on which restitution could have been ordered. One possible ground was pressure exerted by the public authority. Thus Lord Browne-Wilkinson stated that 'payment under implied compulsion' (at 166 and 782) was a relevant consideration and Lord Slynn of Hadley stated that the facts 'shaded into' the duress and colore officii cases because of the 'common element of pressure' (at 204 and 787). As to duress see PARA 44 et seq ante; and as to the colore officii (colour of office) cases see PARA 48 ante. However, Lord Goff of Chieveley stated that the possibility of distraint by the Inland Revenue was so remote that 'the concept of compulsion would have to be stretched to the very utmost to embrace the circumstances of a case such as this' (at 173 and 760). The other possible ground on which restitution of the money could have been paid was that there was 'no consideration' for the payment (at 166 and 754 per Lord Goff of Chieveley, and at 197 and 781-782 per Lord Browne-Wilkinson). As to absence of consideration as a ground on which restitution can be ordered see PARA 87 et seq post. While the ground of restitution recognised in *Woolwich Equitable Building Society v IRC* supra may shade into other recognised grounds of restitution, it would seem that it is in fact a distinct ground on which restitution can be ordered, and this has been recognised in *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558, [2007] 1 All ER 449. The decision built on the foundations laid in academic writings (see principally Birks 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' in Finn (Ed) *Essays on Restitution* (1990) Ch 6) and in earlier cases (such as *Campbell v Hall* (1774) 1 Cowp 204; *Steele v Williams* (1853) 8 Exch 625; *Hooper v Exeter Corpn* (1887) 56 LJQB 457; *Queen of the River Steamship Co Ltd v Conservators of the River Thames* (1899) 15 TLR 474; *A-G v Wilts United Dairies Ltd* (1921) 37 TLR 884, CA; *Brocklebank Ltd v R* [1925] 1 KB 52, CA; *R v Tower Hamlets London Borough Council, ex p Chetnick Developments Ltd* [1988] AC 858, sub nom *Tower Hamlets London Borough Council v Chetnick Developments Ltd* [1988] 1 All ER 961, HL). A similar right is recognised by European law in respect of charges levied by member states contrary to Community law: see Case 199/82 *Amministrazione delle Finanze dello Stato v SpA Giorgio* [1983] ECR 3595, EC].

2 A claimant who wishes to do so may be able to recover the money paid on the ground of mistake: see PARA 28 et seq ante. See also *Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs* [2006] UKHL 49, [2007] 1 AC 558, [2007] 1 All ER 449 (fact that taxpayer had a concurrent claim under the *Woolwich* principle did not prevent him from bringing a claim to recover based on a mistake of law) but the decision in *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL, relieves the claimant of the need to prove that he was mistaken in order to be able to recover. Eg the claimants in that case were not mistaken because they believed, correctly, that the demand issued by the Inland Revenue was ultra vires, but they were nevertheless entitled to recover the money so paid.

3 The fact that the claimant need no longer prove duress on the part of the public authority does not mean that duress and its satellite doctrines, such as the colore officii (colour of office) cases, are now redundant. The willingness of the majority of the House of Lords in *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL, to explain cases such as *Steele v Williams* (1853) 8 Exch 625 and *Hooper v Exeter Corpn* (1887) 56 LJQB 457 as colore officii cases suggests that there may be a role, albeit a reduced one, for these cases in the future: see PARA 48 ante.

4 In *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL, the payment was preceded by a demand for payment. It is not clear what the common law position is where it is the payer who takes the initiative and makes the payment before any demand is made of him. The introduction of self-assessment of taxation may well increase the likelihood of this occurring, although, in such a case, the recovery of any overpayments made may be regulated by the tax legislation itself: see further PARA 59 post.

5 The extent to which this principle extends beyond the payment of taxation is currently unclear. In *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 197, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 781, HL, Lord Browne-Wilkinson referred to an ultra vires demand for 'a tax or other impost' but it is not clear what is encompassed within the latter category. There are a range of possible levies or imposts which may fall within the scope of the principle in *Woolwich Equitable Building Society v IRC* supra: see eg *Steele v Williams* (1853) 8 Exch 625 (unlawful charge for taking extracts from a parish register); *Queens of the River Steamship Co Ltd v Conservators of the River Thames* (1899) 15 TLR 474 (excessive charges levied for making use of pier facilities). It is not clear whether *Woolwich Equitable Building Society v IRC* supra would apply to a demand made by a privatised utility but the point may not be of great practical significance because there would appear to be a principle which has some similarities to the principle in *Woolwich Equitable Building Society v IRC* supra itself according to which 'money paid to a person for the performance of a statutory duty, which he is bound to perform for a sum less than that charged by him, is . . . recoverable to the extent of the overcharge': *Woolwich Equitable Building Society v IRC* supra at 165 and 753 per Lord Goff of Chieveley (citing *Great Western Rly Co v Sutton* (1869) LR 4 HL 226; *South of Scotland Electricity Board v British Oxygen Co Ltd (No 2)* [1959] 2 All ER 225, [1959] 1 WLR 587, HL).

6 Although the claimant must establish that the demand for tax was ultra vires in order to recover the money paid, it is not necessary for the claimant first to bring judicial review proceedings in order to establish that the demand was indeed ultra vires: *British Steel plc v Customs and Excise Comrs* [1997] 2 All ER 366, CA. However, before *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v*

*IRC (No 2)* [1992] 3 All ER 737, HL, there had in fact been earlier judicial review proceedings (see *Woolwich Equitable Building Society v IRC* [1991] 4 All ER 92, sub nom *R v IRC, ex p Woolwich Equitable Building Society* [1990] 1 WLR 1400, HL). Thus the claimant does not have to comply with the short time limits which are applicable to an application for judicial review. As to judicial review see CIVIL PROCEDURE vol 12 (2009) PARA 1530; JUDICIAL REVIEW.

7 There are, of course, other factors which may lead to the conclusion that the demand was ultra vires; eg the ultra vires quality of the demand may stem from an error of law, an abuse of discretion or some procedural unfairness. The point was left open in *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 177, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 764, HL, per Lord Goff of Chieveley, and at 201 and 787 per Lord Slynn of Hadley, but the fact that their Lordships were unwilling to draw a distinction between the invalidity of the subordinate legislation and the misconstruction of a statute suggests that what is important is the fact that the demand is ultra vires and not the cause of the demand being ultra vires.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/4. ULTRA VIRES DEMANDS BY A PUBLIC AUTHORITY/59. The relationship between the common law right and statutory rights of recovery.

### **59. The relationship between the common law right and statutory rights of recovery.**

The right to recover tax which has been overpaid is regulated both by statute and the common law. The effect of statute may be to provide a comprehensive regime which excludes the operation of the common law right of recovery<sup>1</sup>. Alternatively, the statutory right and the common law right may co-exist so that the claimant has a choice whether or not to pursue the statutory right of recovery or the common law right<sup>2</sup>. It is also possible for the parties to enter into a contract which governs the right to recover any payment which is found to have been overpaid<sup>3</sup>.

1 See eg the Value Added Tax Act 1994 s 80(3) (as amended) (overpaid tax cannot be recovered where the effect of allowing recovery would be the unjust enrichment of the taxpayer: see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 311); and *Marks and Spencer plc v Customs and Excise Comrs* [1999] STC 205, [1999] 1 CMLR 1152, CA. In effect, this is a statutory version of the defence of passing on which the common law has rejected.

2 The position is not entirely clear in relation to the Taxes Management Act 1970 s 33 (as amended), which provides for the recovery of overpaid income tax or capital gains tax: see INCOME TAXATION vol 23(2) (Reissue) PARA 1733. In *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 176, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 763, HL, Lord Goff of Chieveley stated that 'most cases will continue for the time being to be regulated by the various statutory regimes now in force'. The point did not arise on the facts of *Woolwich Equitable Building Society v IRC* supra because the Taxes Management Act 1970 s 33 (as amended) only applies where there has been an excessive assessment by reason of some error or mistake in the tax return and no such error or mistake had been made. In *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49 at [19], [2007] 1 AC 558 at [19], [2007] 1 All ER 449 at [19] Lord Hoffmann said 'When a special or qualified statutory remedy is provided, it may well be inferred that Parliament intended to exclude any common law remedy which would or might have arisen on the same facts . . . But I see no reason to infer that Parliament intended to exclude a common law remedy in all cases of mistake (whether of fact or law) in which the Revenue was unjustly enriched but did not fall within s 33'; and see also at [52]-[56] per Lord Hope of Craighead and [135]-[137] per Lord Walker of Gestingthorpe.

3 *Sebel Products Ltd v Customs and Excise Comrs* [1949] Ch 409, [1949] 1 All ER 729. However, the mere fact that the money has been paid under protest does not give rise of itself to the inference that the parties have reached an agreement that the money will be repaid if the demand is later found to be ultra vires: *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 165, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 754, HL, per Lord Goff of Chieveley.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/4. ULTRA VIRES DEMANDS BY A PUBLIC AUTHORITY/60. Defences.

## 60. Defences.

While the defendant in a claim for restitution following an ultra vires demand by a public authority<sup>1</sup> has available the usual array of defences to a restitutionary claim<sup>2</sup>, some of these defences, particularly change of position, may be difficult to apply to public authorities<sup>3</sup>. The fact that the claimant has passed the tax or other impost on to a third party does not of itself provide the defendant with a defence to the claim for repayment<sup>4</sup>. The fact that the claimant has submitted to an honest demand made by the defendant may provide the defendant with a defence to the claim<sup>5</sup>. Thus a claimant who has the opportunity of contesting his liability in proceedings but instead gives way and pays the money demanded may find that the defendant has a valid defence to his claim<sup>6</sup> as will a claimant who pays money in such circumstances that the payment was made to close the transaction<sup>7</sup>.

1 This may be termed a 'Woolwich claim': see *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL; and PARAS 58-59 ante.

2 As to defences see PARA 165 et seq post.

3 It may be difficult for a public authority to show that it has changed its position as a result of the receipt of a particular benefit: see eg *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 946-954, (1993) 91 LGR 323 at 387-397; *Storthoaks Rural Municipality v Mobil Oil of Canada Ltd* (1975) 55 DLR (3d) 1. As to the defence of change of position see PARAS 166-169 post.

4 *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380, [1996] 4 All ER 733, CA. See also, more generally, PARA 172 post. In *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 177-178, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 764, HL, Lord Goff of Chieveley left open the question whether passing on could operate as a defence in the present context and added that 'the availability of such defence may depend on the nature of the tax or other levy'. The point may, therefore, be an open one, notwithstanding the subsequent decision of the Court of Appeal in *Kleinwort Benson Ltd v Birmingham City Council* supra.

5 The existence and scope of the defence are currently a matter of some uncertainty. See generally Arrowsmith 'Mistake and the Role of the "Submission to an Honest Claim"' in Burrows (Ed) *Essays on the Law of Restitution* (1991) Ch 2.

6 See eg *William Whiteley Ltd v R* (1909) 101 LT 741; *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 165, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 754, HL, per Lord Goff of Chieveley.

7 See eg *Maskell v Horner* [1915] 3 KB 106 at 118, CA, per Lord Reading CJ; *Twyford v Manchester Corp'n* [1946] Ch 236, [1946] 1 All ER 621; *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 165, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 754, HL, per Lord Goff of Chieveley, and at 204 and 787 per Lord Slynn of Hadley.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/4. ULTRA VIRES DEMANDS BY A PUBLIC AUTHORITY/61. Proprietary claims.

## 61. Proprietary claims.

The claim to recover money paid pursuant to an ultra vires demand by a public authority<sup>1</sup> is a personal claim and it appears that it does not give rise to a proprietary claim<sup>2</sup>.

Where the Crown pays money out of the Consolidated Fund without authority to do so, it would appear that the Crown has a proprietary claim to recover the money<sup>3</sup>.

1 See PARAS 58-60 ante.

2 Cf *Zaidan Group Ltd v City of London* (1987) 36 DLR (4th) 443, where Barr J held that the defendant city council was a constructive trustee of the overpayment so that the claimant was entitled to recover the interest which the City of London had earned on the money. However, the constructive trust argument was abandoned on appeal (see (1990) 64 DLR (4th) 514). As to constructive trusts see further TRUSTS vol 48 (2007 Reissue) PARA 687 et seq.

3 *Auckland Harbour Board v R* [1924] AC 318, PC; *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 177, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 763, HL, per Lord Goff of Chieveley. See further PARA 142 post. Whether reciprocity demands that the claimant be given a proprietary claim remains an open question. As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 78 (2010) PARAS 1028-1031.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(1) INTRODUCTION/62. In general.

## 5. DISCHARGE OF DEBTS

### (1) INTRODUCTION

#### 62. In general.

Discharge of debts encompasses: (1) situations where the claimant has under compulsion made a payment which has discharged the primary liability of another<sup>1</sup>; and (2) situations where the claimant is liable with another or others to a common demand by a third party, has discharged more than his proportionate share of the joint liability and is able to obtain contribution from his co-debtors<sup>2</sup>.

It is a well-established rule of English law that a payment made by a person without compulsion, intending to discharge another's debt, will not discharge that debt unless he acted with that other's authority or if that other subsequently ratifies the payment<sup>3</sup>. However, there is an important exception to this general principle where a payment has been made under compulsion of law, in which case the liability will be discharged and the payer will have a claim in restitution against the party benefited by the payment<sup>4</sup>. The discharge of his liability is regarded as an incontrovertible benefit to him, because it has saved him a necessary expense<sup>5</sup>.

1 See PARA 63 et seq post.

2 See PARA 80 et seq post.

3 *Belshaw v Bush* (1851) 11 CB 191; *James v Isaacs* (1852) 12 CB 791; *Simpson v Eggington* (1855) 10 Exch 845; *Aiken v Short* (1856) 1 H & N 210; *Lucas v Wilkinson* (1856) 1 H & N 420; *Re Rowe, ex p Derenburg & Co* [1904] 2 KB 483, CA; *Smith v Cox* [1940] 2 KB 558, [1940] 3 All ER 546; *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd* [1980] QB 677, [1979] 3 All ER 522; *Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd and British Telecommunications plc* (1991) 63 P & CR 143, [1991] 2 EGLR 46, CA; *Crantrave Ltd v Lloyds Bank plc* [2000] 2 All ER (Comm) 89 at 94, CA, per Pill LJ.

In cases where the payment is made but is ineffective to discharge the debt, if the creditor continues to press for payment from the debtor, he may well ratify the payment; but if he does not and makes payment himself, the payer should be entitled to recover the initial payment from the creditor on the basis of a total failure of consideration: see *Hirachand Punamchand v Temple* [1911] 2 KB 330 at 337, CA, per Williams LJ, and at 342 per Farwell LJ; and CONTRACT vol 9(1) (Reissue) PARAS 748-749, 926, 945, 1045. As to consideration see CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

If the creditor simply keeps the payment and does not make a claim against the debtor, the payer may make a claim against the debtor for recoupment of the payment; and if the debtor does not ratify the payment, the payer may seek to recover it from the creditor, again on the ground of total failure of consideration: see *Walter v James* (1871) LR 6 Exch 124 at 127 per Kelly CB.

4 See PARA 63 et seq post.

5 See PARA 16 ante.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/63. General rule.

## (2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT

### 63. General rule.

Where the claimant has been compelled by law to pay, or, being compellable by law, has paid, money which the defendant was ultimately liable to pay, so that the defendant obtains the benefit of the payment by the discharge of his liability, the defendant is held indebted to the claimant in the amount of the payment<sup>1</sup>.

The requirements for the application of this rule are as follows:

- 3 (1) the claimant must have made an actual or virtual payment of money<sup>2</sup>; neither the incurring of a liability<sup>3</sup> nor the loss of goods<sup>4</sup> can be treated as money paid;
- 4 (2) the claimant must have been compelled, or compellable, to pay this money to a third party<sup>5</sup>, or have been requested by the defendant to pay it<sup>6</sup>;
- 5 (3) the claimant must not officiously have intervened so as to expose himself to the liability to make the payment<sup>7</sup>; and
- 6 (4) the defendant must have been legally liable to pay the third party<sup>8</sup>, though the reason for that liability need not be the same as the one which induced the claimant to pay the third party<sup>9</sup>.

1 See Leake *The Elements of the Law of Contracts* (1867) p 41, which was cited with approval in *Moule v Garrett* (1872) LR 7 Exch 101 at 104, Ex Ch, per Cockburn CJ, and in *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 at 543-544, [1936] 3 All ER 696 at 706, CA, per Lord Wright MR. See also *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487 at [66]-[67], [2004] 2 All ER (Comm) 289 at [66]-[67] per Clarke LJ.

2 See the cases cited in notes 3-4 infra.

3 Therefore, where one of the makers of a joint and several promissory note gave a bond to the holder when the note was due, but paid no money on the bond, it was held that he could not recover contribution against other makers of the promissory note: see *Maxwell v Jameson* (1818) 2 B & Ald 51. See also *Taylor v Higgins* (1802) 3 East 169; cf *Barclay v Gooch* (1797) 2 Esp 571, where Lord Kenyon CJ held that a claimant giving a promissory note for the defendant's debt, which the defendant's creditor accepts in payment, may maintain an action against the defendant for money paid to his use. See also *Fahey v Frawley* (1890) 26 LR Ir 78 at 89-90.

4 Where a claimant's goods are distrained on the defendant's premises for rent due to the defendant's landlord and purchased by a stranger, the claimant cannot maintain an action for money paid to the use of the defendant, the money paid never having been the claimant's money: *Moore v Pyrke* (1809) 11 East 52. Where, however, the claimant's goods are seized by a stranger under a writ of fieri facias for a debt which (as between claimant and defendant) the defendant should have paid, the claimant may recover their value from the defendant as 'money paid', because the levy of the sheriff has converted the claimant's goods into money: *Rodgers v Maw* (1846) 15 M & W 444, distinguishing *Moore v Pyrke* supra on this ground.

5 See PARA 64 et seq post. For the situation where under compulsion the claimant makes a payment to the defendant see PARA 78 post.

6 See PARA 76 post.

7 See PARA 77 post.

8 See PARA 75 post. There is an exception to this requirement where the payment is made at the request of the defendant: see PARA 76 post.

9 See eg *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534, [1936] 3 All ER 696, CA (the defendant importers were liable to pay customs dues, but the claimants as bonded warehouse-keepers would have committed an offence under statute if they did not pay the sum due).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/64. Compulsion on the claimant.

#### **64. Compulsion on the claimant.**

The basis of the claimant's claim under the rule<sup>1</sup> is that he has been compelled to pay the debt or discharge the liability of the defendant. Though the person compelled to pay usually stands in some kind of relationship to the person for whom he pays, no relationship of privity is necessary to give a right of action<sup>2</sup>. The claimant need not have been sued for the money; it is sufficient that he, being compellable by law, has paid money which the defendant was ultimately liable to pay<sup>3</sup>.

The compulsion may be founded on a rule of common law<sup>4</sup> or upon statute<sup>5</sup>. It is not necessary, however, that there should be legal compulsion; it is sufficient that there is compulsion in fact<sup>6</sup>, or that the liability was undertaken by agreement between the claimant and the defendant<sup>7</sup>, or in circumstances where the defendant is estopped from denying such an agreement<sup>8</sup>. It is, however, fatal to such a claim that payment was made voluntarily<sup>9</sup>, or in consequence of the claimant's own wrongdoing<sup>10</sup>.

1 See PARA 63 ante.

2 *Edmunds v Wallingford* (1885) 14 QBD 811 at 815, CA, per Lindley LJ; and see *Roberts v Crowe* (1872) LR 7 CP 629 at 637 per Willes J. See also *Griffinhoofe v Daubuz* (1855) 5 E & B 746, Ex Ch; *The Orchis* (1890) 15 PD 38, CA; *England v Marsden* (1866) LR 1 CP 529, which was questioned in *Edmunds v Wallingford* supra. As to the right of an agent to be reimbursed or indemnified by his principal see AGENCY vol 1 (2008) PARA 111 et seq. As to privity see CONTRACT vol 9(1) (Reissue) PARA 748 et seq.

3 *Johnson v Royal Mail Steam Packet Co* (1867) LR 3 CP 38 at 43 per Willes J; *Moule v Garrett* (1872) LR 7 Exch 101 at 104 per Cockburn CJ; *Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd and British Telecommunications plc* (1991) 63 P & CR 143, [1991] 2 EGLR 46, CA.

4 See PARA 65 post.

5 See PARA 66 post.

6 See PARA 67 post.

7 See PARA 71 post.

8 See PARA 72 post.

9 See PARA 77 post.

10 See PARA 73 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/65. Compulsion at common law.

## 65. Compulsion at common law.

The most obvious example of a compulsory payment for the benefit of another occurs where a surety, or a person in a position analogous to that of a surety, is called upon to pay a sum of money on the default of the principal debtor or other person primarily liable<sup>1</sup>. He may recover the money so paid, historically based on a fictional 'implied contract' of indemnity<sup>2</sup>. Thus a person becoming bail for another may recover from that other expenses he has been put to by reason of it<sup>3</sup>; the drawer or indorser of a bill who has been compelled to pay the holder may sue the acceptor<sup>4</sup>; and the acceptor of an accommodation bill may be entitled to be indemnified by the person accommodated<sup>5</sup>. Where a partner accepts a bill in the name of the firm for a debt due from him personally, and another partner is compelled to pay the bill, the latter may recover the amount from the former by a claim in restitution<sup>6</sup>; and where a person in the course of his employment incurs a liability on the employer's behalf which he is compelled to discharge, he may recover any payment so made from his employer<sup>7</sup>. Compulsion by foreign law is sufficient<sup>8</sup>.

1 As to sureties see generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq. As to bail in criminal proceedings see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1165 et seq.

2 See eg *Re A Debtor (No 627 of 1936)* [1937] Ch 156, [1937] 1 All ER 1, CA. For a wife's equity of exoneration where her property has been charged for her husband's benefit see *Drummond v Drummond* (1868) 37 LJ Ch 811. For persons in a position analogous to that of a surety see *Hales v Freeman* (1819) 4 Moore CP 21 (payment of legacy duty by executor); *Bate v Payne* (1849) 13 QB 900 (similar case; cf *Foster v Ley* (1835) 2 Bing NC 269); *Longchamp v Kenny* (1779) 1 Doug KB 137 (goods entrusted to A for sale, but possession obtained by B, and A compelled to pay the value to the owner; it was held that he might recover from B the amount so paid); *Brown v Hodgson* (1811) 4 Taunt 189 (carrier by mistake delivered goods to B instead of to C; being compelled to pay their value to C, he was held entitled to recover from B); *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487, [2004] 2 All ER (Comm) 289. The right to restitution may be ousted by an express agreement between the parties, or by the taking of security: see *Toussaint v Martinnant* (1787) 2 Term Rep 100 (separate indemnity bond taken from debtor by surety).

3 *Fisher v Fallows* (1804) 5 Esp 171; *Emery v Clark* (1857) 2 CBNS 582. See also *Jones v Orchard* (1855) 16 CB 614. As to the illegality of an express contract to indemnify the surety see CONTRACT vol 9(1) (Reissue) PARA 849.

4 *Pownall v Ferrand* (1827) 6 B & C 439; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1456.

5 See *Asprey v Levy* (1847) 16 M & W 851; *Reynolds v Doyle* (1840) 2 Scott NR 45; *Driver v Burton* (1852) 17 QB 989; *Bleaden v Charles* (1831) 5 Moo & P 14. See also the Bills of Exchange Act 1882 s 28; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1482, 1583-1585.

6 *Cross v Cheshire* (1851) 7 Exch 43.

7 See AGENCY vol 1 (2008) PARA 111.

8 *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep 560.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/66. Compulsion by statute.

## 66. Compulsion by statute.

There is a class of case in which the defendant, though not primarily liable as regards third persons, is required by statute to discharge a liability which would otherwise fall on the

claimant, and by reason of his default the claimant has been compelled to pay. Thus where a landlord is required to bear the burden of rates and taxes or expenses which are payable in the first instance by the tenant and fails to do so, the tenant may (unless he is restricted to making a deduction from his rent<sup>1</sup>) recover the amount of such payment as he has been compelled to make by a claim in restitution<sup>2</sup>. Where a bonded warehouse was compelled by statute to pay, on demand by customs, the duties on the defendant's packages stolen (without negligence on its part) while stored in its warehouse, it was held that the bonded warehouse was entitled to be reimbursed by the defendant because it had been compelled by law to pay the duty which the defendant was primarily liable to pay<sup>3</sup>.

Where, however, the statute itself provides the claimant's remedy, as by allowing an employer to deduct the tax from the employee's emoluments, that, as a general rule, is his only remedy, and an employer who omits to make the deduction cannot treat his payment as a basis for a claim in restitution<sup>4</sup>. Compulsion by foreign law is sufficient<sup>5</sup>.

1 See eg *Denby v Moore* (1817) 1 B & Ald 123; *Cumming v Bedborough* (1846) 15 M & W 438 (cases where tenants who had paid rent without making deductions in respect of the landlords' property tax formerly payable were held to have no right of action).

2 *Dawson v Linton* (1822) 5 B & Ald 521 (payment of local drainage tax by tenant); *Baker v Greenhill* (1842) 3 QB 148 (payment of rate for repair of bridge ratione tenurae); *Earle v Maugham* (1863) 14 CBNS 626 (tenant compelled to pay proportion of expenses of a party wall by his landlord, the adjoining owner); cf *Gebhardt v Saunders* [1892] 2 QB 452 (abatement of nuisance); *Andrew v St Olave's Board of Works* [1898] 1 QB 775 (similar case).

3 *Brook's Wharf & Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 at 544, [1936] 3 All ER 696 at 706, CA, per Lord Wright MR (where the statute in question was the Customs Consolidation Act 1876 s 85). See also *Jefferys v Gurr* (1831) 2 B & Ad 833; *Cross v Cheshire* (1851) 7 Exch 43; *Edmunds v Wallingford* (1885) 14 QBD 811, CA.

4 *Bernard & Shaw Ltd v Shaw* [1951] 2 All ER 267; and see INCOME TAXATION vol 23(1) (Reissue) PARA 765.

5 *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep 560.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/67. Compulsion in fact.

## 67. Compulsion in fact.

The compulsion applied to make the claimant pay the defendant's debt need not be a legal compulsion which admits of no alternative<sup>1</sup>. Thus a payment made under coercion exercised by a person in a position to dictate terms which there is no legal obligation to accept is deemed to be made under compulsion<sup>2</sup>. So long as the compulsion exists, it is immaterial by what machinery it may be applied<sup>3</sup>. It is not necessary, in order to render a payment compulsory, that the claimant should have waited until legal proceedings were actually taken against him<sup>4</sup>; but nor is he disentitled to recover because time may have been given for payment<sup>5</sup>.

1 There may be 'practical' without 'actual legal' compulsion: see *North v Walthamstow UDC* (1898) 62 JP 836, distinguished in *Ellis v Bromley RDC* (1899) 81 LT 224.

2 *Walker v Duncombe* (1824) 2 LJOSKB 80; and see *Atkinson v Denby* (1862) 7 H & N 934, Ex Ch; *Smith v Cuff* (1817) 6 M & S 160; *Horton v Riley* (1843) 11 M & W 492 (money paid under pressure to induce consent to a composition held recoverable as money had and received).

3 *Cross v Cheshire* (1851) 7 Exch 43 (where B, being in partnership with A, gave a promissory note in the partnership name for his private debt; A, having been compelled to pay on the note, was held entitled to recover against B).

4 *Maydew v Forrester* (1814) 5 Taunt 615; *Hutton v Eyre* (1815) 6 Taunt 289; *Cordron v Lord Masserene* (1792) Peake 194; *Hales v Freeman* (1819) 4 Moore CP 21 at 32 per Burrough J; *The Heather Bell* [1901] P 143 (affd [1901] P 272, CA). Payment without legal obligation, by the drawer of an accommodation bill who has received no notice of dishonour to the holder, is voluntary and not recoverable: *Sleigh v Sleigh* (1850) 5 Exch 514, explained in *Re Chetwynd's Estate, Dunn's Trust Ltd v Brown* [1938] Ch 13, [1937] 3 All ER 530, CA.

5 *Carter v Carter* (1829) 5 Bing 406.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/68. Relief of property from distress or lien lawfully exercised.

## 68. Relief of property from distress or lien lawfully exercised.

Another kind of compulsion arises where a person incurs expense in order to recover his own goods which have been lawfully seized or detained for another's debt<sup>1</sup>. For example, where one person's goods have been lawfully distrained for rent due to another person's landlord, the owner of the goods may redeem them and recover the expense from the person distrained upon<sup>2</sup>. Such a right to restitution will not, however, arise where the goods are left on the premises distrained upon for the convenience of their owner<sup>3</sup> or where, as between the owner of the goods and the tenant, the owner is liable for the rent<sup>4</sup>; nor can a person who, without being requested to do so, pays money to prevent distraint upon another person's goods recover in respect of such payment<sup>5</sup>.

Analogous to the case of a claimant having redeemed his own goods distrained for the defendant's rent is that of a claimant having paid off a lien incurred by the defendant in order to obtain his own goods. He, too, may recover the sum so paid from the defendant<sup>6</sup>.

1 *Edmunds v Wallingford* (1885) 14 QBD 811, CA (A's goods were seized under a judgment against B in circumstances which estopped A from setting up his title against the creditor; A was nevertheless entitled to be indemnified by B); *The Orchis* (1890) 15 PD 38, CA (claim in rem brought against a vessel was paid off by the mortgagees of the vessel, who were held entitled to be indemnified by the mortgagors). Similarly, an undertenant paying its immediate lessor's rent under threat of distress or eviction by the head lessor may recover the amount so paid from the immediate lessor as money paid for its use: *Jones v Morris* (1849) 3 Exch 742; *Murphy v Davey* (1884) 14 LR 1r 28. For the right of an undertenant or lodger, where distress is levied, to make a declaration that the immediate tenant has no property in the goods distrained see the Law of Distress Amendment Act 1908 s 1 (as amended); and DISTRESS vol 13 (2007 Reissue) PARAS 951-952.

2 *Exall v Partridge* (1799) 8 Term Rep 308; and see *Edmunds v Wallingford* (1885) 14 QBD 811, CA. These two cases were considered in *Re Button, ex p Haviside* [1907] 2 KB 180 at 188, 190, CA. See also *Taylor v Zamira* (1816) 6 Taunt 524; *Bevan v Waters* (1828) 3 C & P 520; *Johnson v Royal Mail Steam Packet Co* (1867) LR 3 CP 38 at 45 per Willes J. In *Sapsford v Fletcher* (1792) 4 Term Rep 511, an undertenant paid his lessor's ground rent under threat of distress by the superior landlord, and was held entitled to deduct such payment from his own rent. See also *Graham v Tate* (1813) 1 M & S 609; *Gregory v Stanway* (1860) 2 F & F 309. If the owner does not redeem the goods he cannot recover their value in an action for money paid to the use of the lessor: *Moore v Pyrke* (1809) 11 East 52; cf *Rodgers v Maw* (1846) 15 M & W 444.

3 *Griffinhoofe v Daubuz* (1855) 5 E & B 746, Ex Ch. It makes no difference that the tenant also may incidentally obtain a benefit: *Griffinhoofe v Daubuz* supra. In *England v Marsden* (1866) LR 1 CP 529, the claimant had a bill of sale on defendant's goods, but after seizing them he allowed them for his own convenience to remain with the defendant, and subsequently paid the defendant's rent to prevent the goods from being distrained; he was held not entitled to recover; but the decision was doubted in *Edmunds v Wallingford* (1885) 14 QBD 811, CA. For the absence of any right of contribution where one of two persons who hold separate underleases derived from one original lease has paid the whole rent under threat of distress by the original lessor see PARA 81 post.

4 *Edmunds v Wallingford* (1885) 14 QBD 811, CA.

5 *Jones v Simmons* (1881) 45 JP 666.

6 He must give the defendant an opportunity of disputing the amount of the lien: *Bevan v Waters* (1828) 3 C & P 520; and see *Johnson v Royal Mail Steam Packet Co* (1867) LR 3 CP 38 at 46. As to lien generally see LIEN.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/69. Assignment of leases.

## 69. Assignment of leases.

If the assignor of a lease is the original lessee, he may be required to pay rent or be liable for damages for breach of covenant although the relevant liability accrued after the assignment<sup>1</sup>. He may well have an express or implied<sup>2</sup> covenant from the assignee to indemnify him in respect of liabilities incurred after the assignment. In the absence of such a covenant, the assignor can still recover from his immediate assignee, on the basis of an implied contractual term, any sum in respect of rent or damages for breach of covenant which the assignee has had to pay to the lessor<sup>3</sup>. However, the restitutionary principle goes further, permitting the assignor to claim restitution of monies paid to the landlord from subsequent assignees, with whom the assignor is not in a contractual relationship<sup>4</sup>.

1 As to assignment of leases see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 547 et seq.

2 *Id* pursuant to the Law of Property Act 1925 s 77 (as amended): see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 575.

3 *Wolveridge v Steward* (1833) 1 Cr & M 644 at 659-660 (rent); *Burnett v Lynch* (1826) 5 B & C 589; *Smith v Peat* (1853) 9 Exch 161 (breaches of covenant).

4 *Moule v Garrett* (1870) LR 5 Exch 132 (affd (1872) LR 7 Exch 101); *Re Perkins, Poyser v Beyfus* [1898] 2 Ch 182, CA.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/70. Abatement of nuisance.

## 70. Abatement of nuisance.

There is another category of case in which the principle that a claimant may recover from a defendant money paid to a third party which he has been legally compelled to pay in respect of the primary liability of that other<sup>1</sup> has been applied. It concerns cases where an authority serves a notice on the occupier of premises, requiring a nuisance to be abated, with a penalty in default, and the tenant of the premises carries out works for which it turns out that the defendant is liable<sup>2</sup>. However, if the authority merely warns or recommends that works should be done, without the actual or implicit threat of legal proceedings, or if there is no necessity for the work to be done immediately, the requisite element of compulsion will be absent and the claimant will be unable to recover the monies expended from the defendant<sup>3</sup>.

1 See PARA 63 ante.

2 See *Gebhardt v Saunders* [1892] 2 QB 452, DC, where although the tenant was held to have a claim under the relevant statute, it was also held that he was entitled at common law to recover the monies paid on the basis that he had been legally compelled to expend money on what another man ought to have done (at 456 per Day J, and at 458 per Charles J). See also *Andrew v St Olave's Board of Works* [1898] 1 QB 775 at 781 per Lord Russell of Killowen; *North v Walthamstow UDC* (1898) 67 LQB 972; *Rhymney Iron Co v Gelligaer District Council* [1917] 1 KB 589. As to nuisance generally see NUISANCE.

3 *Thompson and Norris Manufacturing Co Ltd v Hawes* (1895) 73 LT 369, CA; *Ellis v Bromley RDC* (1899) 81 LT 224; *Silles v Fulham Borough Council* [1903] 1 KB 829, CA; *Harris v Hickman* [1904] 1 KB 13; *Wilson's Music and General Printing Co v Finsbury Borough Council* [1908] 1 KB 563.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/71. Compulsion by agreement.

## 71. Compulsion by agreement.

The claimant, instead of having the liability imposed upon him by law, may, by agreement with the defendant, have taken upon himself the duty of discharging a liability which would otherwise fall on the defendant; and if the claimant has been compelled to pay an amount, the amount may be recovered by way of a claim in restitution<sup>1</sup>. The rule applies to the case of a claimant who has incurred expense in defending an action on the defendant's behalf or at his express or implied request<sup>2</sup>.

1 Damages for breach of the agreement may of course also be claimed. Such an agreement may even be implied, eg by custom: see *Grissell v Robinson* (1836) 3 Scott 329 (where the cost of drafting a lease, paid by the lessor, was recoverable from the lessee; an agreement by a lessee to pay the lessor's costs of drafting the lease is, however, no longer to be implied: see the Costs of Leases Act 1958; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 121). See also *Wilkinson v Grant* (1856) 18 CB 319 (where negotiations for a mortgage are broken off by the default of the proposed mortgagor, the proposed mortgagee's solicitor has no claim for charges against the proposed mortgagor, but must look to the party retaining him, who in turn has a remedy against the party who occasioned the expense). An agreement may be implied on the special facts of the case: *Hawley v Beverley* (1843) 6 Scott NR 837 (drawer of bill who had accepted composition from acceptor bound to indemnify acceptor against liability to holder); *Stone v Evans* (1796) Peake Add Cas 94 (original lessee obliged to pay ground rent held entitled to recover from assignee in possession). Contrast, however, with *Grissell v Robinson* supra, the earlier case of *Spencer v Parry* (1835) 3 Ad & El 331, where it was held that an action for money paid to the use of a tenant would not lie against the tenant for the breach of an agreement to pay landlord's taxes, there being no original liability on the defendant to pay. In *Bate v Payne* (1849) 13 QB 900, an executor, being required to pay duty on profits accruing from and on the principal value of leaseholds which he had allowed the legatee to occupy for 15 years, recovered the sum paid from the legatee. See also *Groves & Sons v Webb and Kenward* (1916) 85 LJBK 1533, CA (under a contract to store a cargo of wheat the defendants agreed to lighter it and deliver it at the claimants' warehouse, and requested the claimants to issue warrants to enable the wheat to be sold by the defendants; it was held that the claimants were entitled to recover an amount which they had paid to the purchasers of the wheat in respect of the damage done to it while in the lighters); *Thomas Jackson & Co Ltd v Henderson, Craig & Co Ltd* (1916) 115 LT 36, CA (defendants agreed to be bound by the result of an arbitration between A and B as to whether certain goods were up to sample; it was held that it was not an implied term that defendants agreed to pay costs which the claimants might incur in and about such arbitration).

2 *Howes v Martin* (1794) 1 Esp 161; *Williamson v Henley* (1829) 6 Bing 299; *Frixione v Tagliaferro & Sons* (1856) 10 Moo PCC 175; *Re Wells and Croft, ex p Official Receiver* (1895) 72 LT 359; *Pettman v Keble* (1850) 9 CB 701. So the costs of an action brought on another's behalf with his authority, express or implied, may be recovered from him as money paid to his use: *Bailey v Macaulay* (1849) 13 QB 815; *Curtis v Barclay* (1826) 5 B & C 141. As to expenses incurred by request see further PARA 76 post. An acceptor of an accommodation bill who has been compelled to pay the costs of an action thereon may not be able to recover costs from the person accommodated by an action for money paid: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1583.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/72. Compulsion by estoppel.

## 72. Compulsion by estoppel.

A claimant, though under no legal compulsion to pay money on the defendant's behalf, may have paid it under such circumstances that the claimant's authority to pay it on the defendant's behalf may not be disputed by him. In this case, the claimant will be entitled to recover the amount so paid as having been paid for the defendant's use<sup>1</sup>.

<sup>1</sup> *Alexander v Vane* (1836) 1 M & W 511. See also *Re Chetwynd's Estate, Dunn's Trust Ltd v Brown* [1938] Ch 13, [1937] 3 All ER 530, CA (where B at the request of A signed a promissory note jointly and severally with A and paid it off when A defaulted, though unknown to the parties it was unenforceable, A was estopped from denying that he had impliedly promised to reimburse B). As to estoppel generally see ESTOPPEL.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/73. Claimant's own wrongdoing.

## 73. Claimant's own wrongdoing.

Where a person makes a payment in discharge of a liability incurred in consequence of his own negligence or breach of duty<sup>1</sup>, or in respect of a transaction which he knows to be unlawful<sup>2</sup>, he will have no right to restitution. However, the illegality of a transaction in respect of which a payment is made will not disentitle the person making the payment to indemnity where the transaction is not illegal in itself, but only by reason of circumstances which are unknown to him<sup>3</sup>.

<sup>1</sup> *Capp v Topham* (1805) 6 East 392 (payment by auctioneer of duty attaching through his failure to take proper precaution; payment was held not to be recoverable from the owner); *Pitcher v Bailey* (1807) 8 East 171 (sheriff's officer compelled to pay debt in consequence of wrongful release of debtor); *Lewis v Samuel* (1846) 8 QB 685 (payments made by attorney in negligent conduct of cause); *Davison v Fernandes* (1889) 6 TLR 73 (payment by broker of dividend of stocks sold cum dividend, instructions from principal being to sell ex dividend). The same principle applies in actions on grounds of mistake: see *Skyring v Greenwood* (1825) 4 B & C 281; and MISTAKE vol 77 (2010) PARA 74. Cf *North of Scotland Hydro Electric Board v Taylor* 1956 SC 1, Ct of Sess (in the absence of express provision, an indemnity clause will not extend in favour of a party to a contract to that party's own negligence). As to clauses excluding liability for negligence see further CONTRACT vol 9(1) (Reissue) PARA 806.

<sup>2</sup> *Shackell v Rosier* (1836) 2 Bing NC 634 (publication of libel); *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, CA (fraudulent purchase of share on stock exchange); *Josephs v Pebrer* (1825) 3 B & C 639 (purchase of shares in illegal company); *Allkins v Jupe* (1877) 2 CPD 375 (premiums paid on illegal insurance); *Re Parker* (1882) 21 ChD 408, CA (illegal payments at election); *Ex p Mather* (1797) 3 Ves 373 (purchase of contraband goods); *De Begnis v Armistead* (1833) 10 Bing 107 (production of opera and ballets at unlicensed theatre); *Smith's Advertising Agency v Leeds Laboratory Co* (1910) 26 TLR 335, CA (expenses of advertising a lottery); *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 KB 652 (circulars sent out by a letter-addressing agency under contract with moneylender; it was held that the moneylender, having been convicted of circularising minors, could not recover the amount of the fine and costs from the agency). See also *Atkinson v Denby* (1862) 7 H & N 934, Ex Ch. As to the effect of illegality generally see CONTRACT vol 9(1) (Reissue) PARA 836 et seq.

Gaming or wagering contracts made before 1 September 2007 cannot be enforced (see the Gaming Act 1892 s 1; and LICENSING AND GAMBLING vol 67 (2008) PARA 327); however, s 1 is repealed by the Gambling Act 2005 s 334 as from 1 September 2007 and, from that date, the fact that a contract relates to gambling will not prevent its enforcement (see s 335(1)).

3 *Betts v Gibbins* (1834) 2 Ad & El 57; *Adamson v Jarvis* (1827) 4 Bing 66; *Burrows v Rhodes* [1899] 1 QB 816; *Sheffield Corpn v Barclay* [1905] AC 392, HL; *Westminster City Council v Treby* [1936] 2 All ER 21.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/74. Payment must be for defendant's benefit.

#### **74. Payment must be for defendant's benefit.**

For an action for money paid to a person's use to be possible, it is essential that the payment should have been strictly for the benefit of the defendant<sup>1</sup>. It must, in the case of a payment under compulsion, have discharged a legal liability of the defendant, so that payment to a third party will not found such a claim unless the defendant was under a legal liability to pay that third party<sup>2</sup>. Similarly, where a claimant had bought stolen animals in open market and paid for their keep, and under the law formerly in force the property had reverted on the conviction of the thief<sup>3</sup>, the claimant could not recover the price of their keep from the defendant, because from the time when the claimant purchased them until conviction of the thief they were the claimant's own property<sup>4</sup>.

1 The position is different where the payment is made at the request of the defendant: see PARA 76 post.

2 See PARA 75 post.

3 See the Sale of Goods Act 1893 s 24(1) (repealed); and the Larceny Act 1916 s 45(1) (repealed). The title to stolen property is not affected by the conviction of the thief: see the Theft Act 1968 s 31(2); and MARKETS, FAIRS AND STREET TRADING vol 29(2) (Reissue) PARA 1027.

4 *Walker v Matthews* (1881) 8 QBD 109; and see *Butcher v Andrews* (1698) Carth 446 (money lent to defendant's son); *Spencer v Parry* (1835) 3 Ad & El 331 (payment of rates and taxes by landlord); *Lubbock v Tribe* (1838) 3 M & W 607 (promise to pay the value of a cheque lost by bankers to whom it was sent to be credited to a customer's account); *Veitch v Russell* (1842) 3 QB 928 (travelling expenses of doctor visiting patient); *Thurnell v Symonds* (1843) 1 Car & Kir 44 (expenditure on repairs by prospective tenant under an agreement for a lease by defendant, no lease being granted); *Royal Mail Steam-Packet Co v Acraman* (1848) 2 Exch 569 (money advanced under shipbuilding contract, there being no liability to repay until the ultimate balance between the parties was ascertained).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/75. Defendant under no liability to pay.

#### **75. Defendant under no liability to pay.**

The general rule is that a stranger ('A') who purports to pay the debts of a person ('B') to B's creditor ('C') does not thereby obtain a discharge of B's liability to C<sup>1</sup>; a voluntary payment by another to C is effective to discharge B only if that other makes the payment as B's agent, for and on account of B, and with B's prior authority or subsequent ratification<sup>2</sup>. If the payment by A to C does not discharge B, it follows that A cannot succeed against B in an action for restitution<sup>3</sup>. A fortiori, if B never was under any liability to pay the money to C, he is not liable to reimburse A, even where A's payment indirectly benefits B<sup>4</sup>. In the case of payment by indemnity insurers to their assured after a tort, there is no discharge of the tortfeasor's liability to the insured<sup>5</sup>.

- 1 The position is different where the law compels A to pay C: see PARA 65 ante.
- 2 *Simpson v Eggington* (1855) 10 Exch 845 at 847 per Parke B; *Smith v Cox* [1940] 2 KB 558, [1940] 3 All ER 546; *Crantrave Ltd v Lloyds Bank plc* [2000] QB 917, [2000] 2 All ER (Comm) 89 at 94, CA, per Pill LJ. See further CONTRACT vol 9(1) (Reissue) PARA 945. As to an agent's right to reimbursement and indemnity see AGENCY vol 1 (2008) PARA 111.
- 3 See the cases cited in note 4 infra. As to voluntary payments see PARA 77 post.
- 4 *Metropolitan Police District Receiver v Croydon Corpn* [1957] 2 QB 154, [1957] 1 All ER 78, CA, where an injured policeman's damages were reduced by the amount of wages which the police authority, as required by statute, paid him while he was on sick leave, and the authority's action against the tortfeasor to recover the amount of wages so paid failed ('The claimants' financial position has not been altered by a sixpence. Their duty is to pay wages whether the policeman is on duty or not, so long as his absence from duty is caused by an injury received in the course of his duty': see at 83 and 164 per Lord Goddard). The position is different where there is an express or implied request to make the payment: see PARA 76 post. It is submitted that the decision in *Metropolitan Police District Receiver v Tatum* [1948] 2 KB 68, [1948] 1 All ER 612 must be taken to have been impliedly overruled by *Metropolitan Police District Receiver v Croydon Corpn* supra, although not mentioned in that case. In certain circumstances an employer whose employee has suffered injury may be able to bring an action in tort for loss of services of his employee, even though he may have no right of action in restitution: see *Metropolitan Police District Receiver v Croydon Corpn* supra at 82 and 162. See also *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep 560, where agents who had made payment to the insured when goods were damaged were not entitled to recover from the insurer as the policy was voidable.
- 5 See *Esso Petroleum Ltd v Hall, Russell and Co Ltd, The Esso Bernicia* [1989] AC 643, [1989] 1 All ER 37, HL.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/76. Payment by request.

## 76. Payment by request.

Where a payment is made at the express or implied<sup>1</sup> request<sup>2</sup> of another, there will be a right to recover the amount of such payment from that other person, even though the person at whose request the payment was made has not thereby been relieved from any legal action<sup>3</sup>. A right to repayment may likewise exist by virtue of the application of the principle of ratification in agency<sup>4</sup>, or in a case where services have been performed under an unenforceable contract<sup>5</sup>.

- 1 Eg where the claimant is induced by the defendant to bring an action (*Bailey v Haines* (1849) 13 QB 815 at 832), or to defend an action (see the cases cited in PARA 71 note 2 ante); or where from the relationship of principal and agent a promise by the principal to indemnify the agent will be implied (see AGENCY vol 1 (2008) PARA 111).

'If a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, then if he acquiesces in its being done, taking the benefit of it when done, he will be taken impliedly to have requested its being done; and that will import a promise to pay for it': *Re Cleadon Trust Ltd* [1939] Ch 286 at 299, [1938] 4 All ER 518 at 534, CA, per Scott LJ, citing *Smith LC* (13th Edn, 1929) p 156.

If the payment is admitted, then in the absence of any presumption of advancement, there is *prima facie* imported an obligation to repay, and the burden of proof is on the defendant: *Seldon v Davidson* [1968] 2 All ER 755, [1968] 1 WLR 1083, CA.

- 2 *Sleigh v Sleigh* (1850) 5 Exch 514 at 516 per Parke B.
- 3 *Brittain v Lloyd* (1845) 14 M & W 762 at 773 per Pollock CB (approved in *Lewis v Campbell* (1849) 8 CB 541 at 548 per Wilde CJ; *Re A Debtor (No 627 of 1936)* [1937] Ch 156 at 163, [1937] 1 All ER 1 at 8, CA). See also *Re HPC Productions Ltd* [1962] Ch 466 at 487, [1962] 1 All ER 37 at 50 per Plowman J. Cf *The Istros II* [1973] 2 Lloyd's Rep 152 (where no express or implied promise to pay was held to have been made).

The position is different where there is no such request: see PARA 77 post.

4 An effective ratification places all the parties in a position similar to that which they would have occupied if the agent had had actual authority: see AGENCY vol 1 (2008) PARA 69.

5 *Knowlman v Bluett* (1874) LR 9 Exch 307, Ex Ch (oral agreement by father to pay annuity to mother for maintenance of illegitimate children; no memorandum to satisfy the requirements of the Statute of Frauds (1677) s 4 (now repealed except in relation to guarantee), relating to agreements not to be performed within a year; expenditure by mother recoverable as money paid at father's request). See *Souch v Strawbridge* (1846) 2 CB 808. A claimant who pays money to a third person under a guarantee unenforceable on account of the absence of a written memorandum can recover it from the defendant as money paid at his request: *Alexander v Vane* (1836) 1 M & W 511. In such a case a claim will not lie on the ground of total failure of consideration: see PARA 87 et seq post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/77. Voluntary payments to third party.

## 77. Voluntary payments to third party.

A voluntary<sup>1</sup> payment made by one person on behalf of another without his request is not recoverable by a claim in restitution<sup>2</sup>, however clearly the payment is for the defendant's benefit<sup>3</sup>, and even though it may relieve him from a legal liability<sup>4</sup>, or though followed by an express promise of reimbursement without valuable consideration<sup>5</sup>. It has been said, however, that where the person for whom a voluntary payment has been made has the option of either adopting or declining the benefit, and he elects to adopt it, he will become liable to repay the money so paid on his behalf<sup>6</sup>.

1 As to voluntary payments to the defendant see PARA 79 post.

2 'If without an antecedent request a person assumes an obligation or makes a payment for the benefit of another, the law will, as a general rule, refuse him a right of indemnity': *Owen v Tate* [1976] QB 402 at 411-412, [1975] 2 All ER 129 at 135, CA, per Scarman LJ. Cf the Mercantile Law Amendment Act 1856 s 5 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1138). See also *Lampleigh v Brathwait* (1615) Hob 105; *Cartwright v Rowley* (1799) 2 Esp 722; *Child v Morley* (1800) 8 Term Rep 610 at 613 per Lord Kenyon; *Cumming v Forester* (1813) 1 M & S 494 at 500 per Lord Ellenborough CJ; *Denby v Moore* (1817) 1 B & Ald 123; *Wilson v Ray* (1839) 10 Ad & El 82; *Bradshaw v Bradshaw* (1841) 9 M & W 29; *Barber v Pott* (1859) 4 H & N 759; *Re National Motor Mail-Coach Co Ltd, Clinton's Claim* [1908] 2 Ch 515 at 520, 523, CA; *Akt Dampskibs Steinstad v Wm Pearson & Co* (1927) 137 LT 533. A sheriff cannot recover money paid for keeping goods seized under a writ, without an express request: *Bilke v Havelock* (1813) 3 Camp 374.

3 *Tappin v Broster* (1823) 1 C & P 112; *Re Leslie, Leslie v French* (1883) 23 ChD 552; *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234, CA; *Re Earl Winchelsea's Policy Trusts* (1888) 39 ChD 168; *Fry v Lane, Re Fry, Whittet v Bush* (1888) 40 ChD 312 at 325; *Atkins v Banwell* (1802) 2 East 505. See also *Victors v Davies* (1844) 12 M & W 758.

4 *Re Cleadon Trust Ltd* [1939] Ch 286, [1938] 4 All ER 518, CA; *Sleigh v Sleigh* (1850) 5 Exch 514 (explained in *Re Chetwynd's Estate, Dunn's Trust Ltd v Brown* [1938] Ch 13, [1937] 3 All ER 530, CA); *Johnson v Royal Mail Steam Packet Co* (1867) LR 3 CP 38 at 43 per Willes J. The defendant may be liable, however, for a payment made at his request, even though he may not thereby be relieved from any legal action: see PARA 76 ante.

5 *Eastwood v Kenyon* (1840) 11 Ad & El 438; *Re National Motor Mail-Coach Co Ltd, Clinton's Claim* [1908] 2 Ch 515 at 523, CA, overruling on one point *Re English and Colonial Produce Co Ltd* [1906] 2 Ch 435, CA. A fortiori, a claimant cannot recover money paid for the defendant against the defendant's will: *Stokes v Lewis* (1785) 1 Term Rep 20; *Warwick v Slade* (1811) 3 Camp 127; *Fisher v Liverpool Marine Insurance Co* (1874) LR 9 QB 418, Ex Ch; *Home Marine Insurance Co Ltd v Smith* [1898] 2 QB 351, CA; *Bowlby v Bell* (1846) 3 CB 284; *Howard v Tucker* (1831) 1 B & Ad 712. As to the common law liability of a husband for expenses incurred for the funeral of his wife see PARA 133 post; and CREMATION AND BURIAL vol 10 (Reissue) PARA 937.

6 *Leigh v Dickeson* (1884) 15 QBD 60 at 64-65, CA, per Brett MR; *Barber v Brown* (1856) 1 CBNS 121 at 151; *Roberts v Champion* (1826) 5 LJOSKB 44.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/78. Payment under compulsion to defendant: general rule.

## **78. Payment under compulsion to defendant: general rule.**

A person who voluntarily<sup>1</sup> pays a sum of money on another person's demand cannot claim restitution of it from a payee, because, since he might have resisted the demand, the payment must be taken to have been voluntary. If, however, the payment is made under duress<sup>2</sup> or some form of compulsion other than legal compulsion<sup>3</sup>, it is deemed to be involuntary, and the sum paid is recoverable in restitution<sup>4</sup>. This principle is very similar to that which applies where the claimant has been compelled to make a payment to a third party<sup>5</sup>, and some of the factual situations to which it extends may also be covered by the principle misleadingly termed 'waiver of a tort'<sup>6</sup>.

1 As to what constitutes a voluntary payment see PARA 79 post.

2 As to economic duress in the context of restitution see PARA 49 ante; and *Universe Tankships Inc of Monrovia v International Transport Workers' Federation, The Universe Sentinel* [1983] 1 AC 366, [1982] 2 All ER 67, HL; *Dimskal Shipping Co SA v International Transport Workers' Federation, The Evia Luck (No 2)* [1992] 2 AC 152, [1991] 4 All ER 871, HL. Both of these cases illustrate that two elements are required for restitution: first, that the pressure was illegitimate (which is not limited to pressure which constitutes the commission or the threat of commission of a crime or a tort, but can in certain circumstances include a breach or the threat of breach of contract); and secondly, that the pressure resulted in the payment. As to whether economic duress will render a contract voidable see also *Pao On v Lau Yiu Long* [1980] AC 614, [1979] 3 All ER 65, PC. As to duress see generally para 44 et seq ante.

3 As to legal compulsion see PARA 64 et seq ante.

4 *Brown v M'Kinally* (1795) 1 Esp 279; *Denby v Moore* (1817) 1 B & Ald 123; *Andrew v Bridgman* [1908] 1 KB 596, CA; *William Whiteley Ltd v McGregor* (1909) 101 LT 741 at 745. Protest, if followed by acquiescence, will not prevent payment from being voluntary: *Spragg v Hammond* (1820) 2 Brod & Bing 59; *Gulliver v Cosens* (1845) 1 CB 788; *Twyford v Manchester Corpn* [1946] Ch 236, [1946] 1 All ER 621; but see *Andrew v Bridgman* supra. Payment of an illegal demand has been said not to be the subject of an action for money had and received unless paid under an immediate and urgent necessity, or as otherwise expressed, unless to redeem one's person or goods: *Dawson v Remnant* (1806) 6 Esp 24; *Fulham v Down* (1798) 6 Esp 26n. If the validity of a demand for payment is to be challenged, the best course may be to refuse to pay: see *Twyford v Manchester Corpn* supra at 242 and 628 per Romer J.

5 See PARA 63 ante.

6 As to waiver of a tort see PARAS 25 ante, 161 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(2) COMPULSORY DISCHARGE OF ANOTHER'S DEBT/79. Voluntary payments to defendant.

## **79. Voluntary payments to defendant.**

The rules governing what constitutes a voluntary payment to the defendant are similar to those in relation to payments made to third parties<sup>1</sup>. A payment made to recover wrongfully detained goods is generally involuntary for this purpose<sup>2</sup>; and, a fortiori, an action in restitution will normally lie to recover benefits conferred on the defendant as a result of the latter's duress or undue influence on the claimant<sup>3</sup>. In addition, apart from money paid under the compulsion of

legal process<sup>4</sup>, the law recognises that there are other acts or threats by the defendant which may render a payment involuntary for the purpose of such an action<sup>5</sup>.

The line dividing a voluntary from a compulsory payment is often a narrow one<sup>6</sup>.

1 See PARA 77 ante.

2 See *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, [1978] 3 All ER 1170. See also PARA 46 ante.

3 As to the effect of duress (including economic duress) or undue influence on any contract between the parties see PARA 44 et seq ante; and CONTRACT vol 9(1) (Reissue) PARAS 710-712.

4 As to money paid under the compulsion of legal process see PARA 47 ante.

5 See PARAS 48-49 ante.

6 An excessive payment to a water company on demand without threat was held to be voluntary (*Slater v Burnley Corp* (1888) 59 LT 636; in this case the county court judge (whose decision was reversed) had held that the company's power to cut off the water supply amounted to compulsion); *Twyford v Manchester Corp* [1946] Ch 236, [1946] 1 All ER 621 (burial fees; payment voluntary though under protest). Payment made by a tenant after distress to recover his goods has been held voluntary, on the ground that, even if his goods were wrongfully distrained, the tenant had his remedy of replevin, or perhaps excessive distress (*Skeate v Beale* (1840) 11 Ad & El 983 at 991; but see *Graham v Tate* (1813) 1 M & S 609, explained and distinguished in *Yates v Eastwood* (1851) 6 Exch 805, the last case being followed in *Evans v Wright* (1857) 2 H & N 527), and the tenant was not bound to pay the whole amount (*Glynn v Thomas* (1856) 11 Exch 870, Ex Ch; *Lindon v Hooper* (1776) 1 Cowp 414; *Knibbs v Hall* (1794) 1 Esp 84; *French v Phillips* (1856) 2 Jur NS 1169, Ex Ch). If the landlord sells the goods, thus making replevin impossible, it would appear from the judgment in *Glynn v Thomas* supra that the action lies; but see *Yates v Eastwood* supra; *Evans v Wright* supra, where it was held that an action for money had and received would not lie against a landlord who had omitted to leave the surplus after sale in the hands of the sheriff under the Distress for Rent Act 1689, because proceedings for failure so to leave the surplus were available. The action lies if there is tender before impounding: *Loring v Warburton* (1858) EB & E 507, where it was said that *Glynn v Thomas* supra was not to be extended. See *Green v Duckett* (1883) 11 QBD 275; *Browne v Powell* (1827) 4 Bing 230 (cases of the exercise of the rights of distress damage feasant); and see *Fell v Whittaker* (1871) LR 7 QB 120. See also *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, [1978] 3 All ER 1170.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(3) CONTRIBUTION/80. General rule.

### **(3) CONTRIBUTION**

#### **80. General rule.**

A right to contribution arises whenever a person who owes with another a duty to a third party, and is liable with that other to a common demand, discharges more than his proportionate share of that duty<sup>1</sup>. The essence of the right to a contribution lies in the liability to a common demand<sup>2</sup>; and, where there is such a liability, the court will, subject to any contractual provision modifying or limiting any claim to a contribution<sup>3</sup>, make an assessment of contribution<sup>4</sup>.

1 See Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 385. As to contribution in relation to damages see DAMAGES vol 12(1) (Reissue) PARA 837 et seq.

2 See PARA 81 post.

3 As to exclusion clauses see CONTRACT vol 9(1) (Reissue) PARA 797 et seq ante.

4 See PARA 83 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(3) CONTRIBUTION/81. Common liability essential.

### **81. Common liability essential.**

A common liability being the essence of the right of contribution, no such right against one tenant in common existed in favour of the other tenant in common of a house, who had spent money on proper and reasonable repairs<sup>1</sup>. So, where a claimant and defendant hold separate underleases derived from one original lease, and the claimant has paid rent to the superior landlord under threat of distress upon the premises of both, he is not entitled to sue the defendant for his proportion of the rent so paid as money paid to his use<sup>2</sup>; and the position is the same where the claimant is assignee of part of the premises comprised in the lease and the defendant is sub-lessee of another part, for the defendant being merely a sub-lessee could not have been sued by the lessor<sup>3</sup>. Where, however, both the claimant and defendant are assignees of separate parts of the premises comprised in the lease, and the claimant has paid the whole rent, he can recover contribution from the defendant<sup>4</sup>.

Such a common liability exists as between co-sureties<sup>5</sup>, joint contractors<sup>6</sup>, partners in an action for a general partnership account<sup>7</sup>, trustees committing a breach of trust<sup>8</sup>, directors who employ the assets of their company on an ultra vires undertaking<sup>9</sup>, co-insurers<sup>10</sup>, any person liable to pay compensation in respect of the same damage to another person<sup>11</sup>, or the parties to a common maritime adventure by the rule of general average<sup>12</sup>.

1 *Leigh v Dickeson* (1884) 15 QBD 60, CA. A tenancy in common can now only exist under cover of a trust of land (see the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 7) and questions of repair will depend upon the law of trusts: see further REAL PROPERTY vol 39(2) (Reissue) PARA 207 et seq; TRUSTS vol 48 (2007 Reissue) PARA 714.

2 *Hunter v Hunt* (1845) 1 CB 300.

3 *Johnson v Wild* (1890) 44 ChD 146, explained in *Whitham v Bullock* [1939] 2 KB 81 at 88, [1939] 2 All ER 310 at 316, CA.

4 *Whitham v Bullock* [1939] 2 KB 81 at 88, [1939] 2 All ER 310 at 316, CA. See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 562.

5 See PARA 84 post.

6 See PARA 85 post.

7 See PARA 86 post.

8 See *Lingard v Bromley* (1812) 1 Ves & B 114; and TRUSTS vol 48 (2007 Reissue) PARA 1129.

9 See COMPANIES vol 14 (2009) PARA 592.

10 See *Sickness and Accident Assurance Association v General Accident Assurance Corpn* (1892) 19 R 977 at 980, Ct of Sess; *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1992] QB 887, [1992] 1 All ER 283, CA (prima facie liable for contribution although the assured had not given the required notice; however, on the facts the claim failed because the payment in respect of which the contribution was sought had been voluntarily made in excess of the claimant insurer's liability to pay). See also the Marine Insurance Act 1906 s 80; and INSURANCE vol 25 (2003 Reissue) PARAS 211, 496.

11 See the Civil Liability (Contribution) Act 1978 s 1, which has extended the right to contribution so that it is no longer restricted to tortfeasors: see PARA 82 post. See further TORT vol 45(2) (Reissue) PARA 349 et seq. As to the right of contribution at common law, which still partly governs contribution, see *Adamson v Jarvis* (1827) 4 Bing 66.

12 See SHIPPING AND MARITIME LAW vol 93 (2008) PARA 133.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(3) CONTRIBUTION/82. Statutory right of contribution.

## 82. Statutory right of contribution.

Under the Civil Liability (Contribution) Act 1978, with respect to damage which occurred after 31 December 1978, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or not)<sup>1</sup>. The Act is an application of the principle that there should be restitutionary remedies for unjust enrichment at the expense of another<sup>2</sup>. The phrase 'damage' has been interpreted widely to include claims for damages for breach of contract, for negligence and for restitution and for money paid under mistake of fact or for no consideration<sup>3</sup>. The inclusion of a restitutionary claim has been criticised<sup>4</sup>.

1 Civil Liability (Contribution) Act 1978 s 1(1). See further TORT vol 45(2) (Reissue) PARA 349 et seq.

2 See *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48 at [76], [2003] 2 AC 366 at [76], [2003] 1 All ER 97 at [76] per Lord Hobhouse of Woodborough.

3 See *Friends' Provident Life Office v Hillier Parker May & Rowden (a firm)* [1997] QB 85, [1995] 4 All ER 260, CA; *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487, [2004] 2 All ER (Comm) 289.

4 See Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 387; and see also *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14 at [33], [2002] 2 All ER 801 at [33] per Lord Steyn; cf *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487 at [87], [2004] 2 All ER (Comm) 289 at [87] per Sedley LJ ('the fact (if it is a fact) that a restitutionary claim is not a claim for 'damage suffered' is nothing to the point. The question is whether it is a claim for compensation in respect of damage for which the other party is liable').

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(3) CONTRIBUTION/83. Assessment of contribution.

## 83. Assessment of contribution.

In estimating the amount of contribution to which a claimant is entitled the rule is that regard must be had to the number of persons originally liable who remain liable and solvent at the time of the payment<sup>1</sup>. The defendant is not liable in this form of action to any contribution until the amount actually due from him has been ascertained<sup>2</sup>, nor, as a general rule, can the claimant require other persons to contribute to the costs which he has been compelled to pay in the proceedings which established his liability<sup>3</sup>; but where one of several co-defendants pays the whole of the claimant's costs which were ordered to be paid by the defendants, he can obtain contribution in respect thereof from the other co-defendants in the action<sup>4</sup>. The amount of the contribution recoverable from any person is such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question<sup>5</sup>.

1 'If as between several persons or properties all equally liable at law to the same demand, it would be equitable that the burden should fall in a certain way, the court will so far as possible, having regard to the solvency of the different parties, see that, if the burden is placed inequitably by the exercise of the legal right, its incidence should be afterwards readjusted': *Whitham v Bullock* [1939] 2 KB 81 at 85, [1939] 2 All ER 310 at

314, CA, per Clauson LJ (delivering the judgment of the court and citing Rowlatt *Principal and Surety* (3rd Edn, 1936) p 173).

The rule at law was that regard must be had to the number of persons originally liable (see *Batard v Hawes* (1853) 2 E & B 287) but the present rule, which was the rule in equity (see *Hitchman v Stewart* (1855) 3 Drew 271; *Lowe v Dixon* (1885) 16 QBD 455; *Ramskill v Edwards* (1885) 31 ChD 100), prevails: see the Supreme Court Act 1981 s 49(1); and EQUITY vol 16(2) (Reissue) PARA 500. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

2 *Sharpe v Cummings* (1844) 2 Dow & L 504; *Bates v Townley* (1848) 2 Exch 152. See also *Wolmershausen v Gullick* [1893] 2 Ch 514.

3 See *Knight v Hughes* (1828) 3 C & P 467; *Gillett v Rippon* (1829) Mood & M 406; *Roach v Thompson* (1830) Mood & M 487; *Blyth v Smith* (1843) 5 Man & G 405; *Tindall v Bell* (1843) 11 M & W 228; *Pierce v Williams* (1854) 23 LJ Ex 322. Where, however, the claimant has defended the previous action at the request of other persons, or there have been special circumstances justifying the defence, he may possibly be able to obtain contribution towards the costs he has been compelled to pay: see *The Millwall* [1905] P 155 at 176, CA, per Cozens-Hardy LJ. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1138.

4 *Newry Salt Works Co v Macdonnell* [1903] 2 IR 454.

5 See the Civil Liability (Contribution) Act 1978 s 2(1); and TORT vol 45(2) (Reissue) PARA 352. 'Responsibility involves considerations both of blameworthiness and of causative potency': *Madden v Quirk* [1989] 1 WLR 702 at 707, [1989] RTR 304 at 309 per Brown J.

## UPDATE

### 83 Assessment of contribution

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(3) CONTRIBUTION/84. Contribution between co-sureties.

### 84. Contribution between co-sureties.

The right of contribution exists between co-sureties<sup>1</sup>, even though one surety may be unaware of the existence of the other<sup>2</sup>. The form of the agreement whereby they have agreed to become sureties is immaterial, the real nature of the agreement alone being taken into consideration<sup>3</sup>. The right of contribution also, as a general rule, exists as between co-insurers of the same property, although they contracted independently of one another<sup>4</sup>. A demand by a creditor is not a condition precedent to the surety's liability under a guarantee, so that a surety who makes a payment in the absence of such a demand can nevertheless claim contribution from a co-surety<sup>5</sup>. However, the payment must not be officious or voluntary; for if it is, the co-surety may be able to argue that no contribution should be required<sup>6</sup>.

1 *Whiting v Burke* (1871) 6 Ch App 342; *Arcedeckne v Lord Howard* (1875) 45 LJ Ch 622, HL. As to the basis of the right to contribution see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1165 et seq (but see *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA, a case which has provoked some controversy: Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 138-139).

2 *Macdonald v Whitfield* (1883) 8 App Cas 733, PC; *Craythorne v Swinburne* (1807) 14 Ves 160 at 165 per Lord Eldon LC; *Whiting v Burke* (1871) 6 Ch App 342. Cf *Re Denton's Estate, Licenses Insurance Corp'n and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178, CA (contract of insurance); and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1165.

3 Thus the drawer of a bill who is compelled to pay the whole may claim contribution against the indorser where the real nature of the agreement between them is that both are to be sureties for the acceptor: *Reynolds v Wheeler* (1861) 10 CBNS 561; *Macdonald v Whitfield* (1883) 8 App Cas 733, PC.

4 See PARA 81 note 10 ante.

5 *Stimpson v Smith* [1999] Ch 340, [1999] 2 All ER 833, CA.

6 *Stimpson v Smith* [1999] Ch 340 at 350, [1999] 2 All ER 833 at 839, CA, per Peter Gibson LJ.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(3) CONTRIBUTION/85. Joint contractors.

## 85. Joint contractors.

Where one of several persons jointly, or jointly and severally, liable under a contract<sup>1</sup> is called upon to perform the contract in full, or to discharge more than his own proper share, he has, as a general rule, a right to call upon the persons jointly, or jointly and severally, liable with himself to contribute to the liability which he has incurred, and the payment which he has made will be treated as a payment to the use of all the co-debtors<sup>2</sup>.

The right to contribution<sup>3</sup> does not depend on any express agreement between the parties, and in that sense there may be no privity between them<sup>4</sup>.

1 As to joint and several contractors see CONTRACT vol 9(1) (Reissue) PARA 1079 et seq.

2 *Holmes v Williamson* (1817) 6 M & S 158; *Burnell v Minot* (1820) 4 Moore CP 340; *Edger v Knapp* (1843) 6 Scott NR 707; *Spottiswoode's Case* (1855) 6 De GM & G 345; *Marsack v Webber* (1860) 6 H & N 1 (where two persons jointly employed an arbitrator and one paid the whole of his fees, that person was entitled to recover one half from the other); *Boulter v Peplow* (1850) 9 CB 493 (joint liability for rent); *Dimes v Arden* (1836) 6 Nev & MKB 494 (for repair of a bridge); *Lowe v Dixon* (1885) 16 QBD 455 (joint adventurers); *Wolmershausen v Gullick* [1893] 2 Ch 514 (co-sureties); *Re Snowden, ex p Snowden* (1881) 17 ChD 44, CA (co-sureties). As to the liability of the estate of a deceased contractor see *Prior v Hembrow* (1841) 8 M & W 873 at 889; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 779.

3 As to the right to equitable contribution see EQUITY vol 16(2) (Reissue) PARAS 458-459. As to the right to contribution between co-sureties see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1165 et seq.

4 *Edmunds v Wallingford* (1885) 14 QBD 811 at 815, CA, per Lindley LJ; *Spottiswoode's Case* (1855) 6 De GM & G 345.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/5. DISCHARGE OF DEBTS/(3) CONTRIBUTION/86. Partners.

## 86. Partners.

Where partners are under a joint liability in respect of a particular transaction arising out of and connected with the partnership, and one of them is compelled to pay more than his share of such joint liability, the court will not enforce his right of contribution in respect thereof against his co-partners, except in an action for a general partnership account<sup>1</sup>. This rule has, however, no application where two or more persons engage in a particular transaction which is distinct and separate from their partnership business; in such case the right of contribution will be enforced<sup>2</sup>.

1 *Sedgwick v Daniell* (1857) 2 H & N 319; and see *Sadler v Nixon* (1834) 5 B & Ad 936; *Wilson v Cutting* (1834) 10 Bing 436; *French v Styring* (1857) 2 CBNS 357.

2 *Sedgwick v Daniell* (1857) 2 H & N 319; and see PARTNERSHIP vol 79 (2008) PARA 138.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/6. TOTAL FAILURE OF CONSIDERATION/(1) INTRODUCTION/87. In general.

## 6. TOTAL FAILURE OF CONSIDERATION

### (1) INTRODUCTION

#### 87. In general.

Money paid by the claimant to the defendant is, in principle, recoverable where it has been paid for a consideration which has wholly or totally failed<sup>1</sup>, even in a case where the effect of allowing the claimant to recover is to enable him to escape from a bad bargain<sup>2</sup>. A partial failure of consideration will not generally entitle a claimant to recover the value of the benefit which has been conferred on the defendant<sup>3</sup>. The claim is one to recover money paid; it is not yet possible to recover the value of services rendered or goods supplied on the ground that the consideration for the performance of the services or the provision of the goods has failed<sup>4</sup>.

1 See eg *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL; *Comptoir D'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Ltda, The Julia* [1949] AC 293, [1949] 1 All ER 269, HL. See also *Giles v Edwards* (1797) 7 Term Rep 181; *Hudson v Robinson* (1816) 4 M & S 475; *Wright v Newton* (1835) 2 Cr M & R 124; *Royal Bank of Canada v R* [1913] AC 283, PC; *Strickland v Turner* (1852) 7 Exch 208 (a purchaser of an annuity which had ceased at the time of purchase); *Kennedy v Thomassen* [1929] 1 Ch 426 (death of annuitant before completion); *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, Aust HC. A policy of reinsurance made after the risk has determined is, however, good and the premium paid thereunder cannot be recovered back: *Bradford v Symondson* (1881) 7 QBD 456, CA; and see *Lawes v Purser* (1856) 6 E & B 930; *Begbie v Phosphate Sewage Co* (1876) 1 QBD 679, CA. As to the meaning of 'failure of consideration' see PARA 88 post.

2 *Wilkinson v Lloyd* (1845) 7 QB 27; *Bush v Canfield* 2 Conn 485 (1818), Conn SC.

3 See eg *Whincup v Hughes* (1871) LR 6 CP 78. As to partial failure of consideration see PARA 94 post.

4 Although, analytically, there is a strong case for maintaining that the ground on which restitution is ordered in the services cases is failure of consideration (see Burrows 'Free Acceptance and the Law of Restitution' (1988) 104 LQR 576), the courts have not yet addressed this issue.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/6. TOTAL FAILURE OF CONSIDERATION/(1) INTRODUCTION/88. The meaning of 'failure of consideration'.

#### 88. The meaning of 'failure of consideration'.

It was once thought that a claimant had to avoid a contract ab initio in order to be able to establish that there had been a total failure of consideration<sup>1</sup>. It is now settled, however, that the test is not whether there has ever been a contract, but whether there has ever been any performance by the defendant of any of his obligations under the contract<sup>2</sup>. While it has been stated that the phrase 'failure of consideration' 'is one which in its terminology presupposes that there has been at some stage a valid contract which has been partially performed by one

party<sup>13</sup>, examples can be found of cases in which an identical, or at least very similar, principle seems to operate in a non-contractual context<sup>4</sup>. Thus a claimant who pays money to the defendant on a 'subject to contract' basis and who then decides that he does not wish to go through with the purchase is entitled to recover from the defendant the sum so paid<sup>5</sup>. Other examples can be found of money which has been advanced for a particular purpose and which has been held to be recoverable by the payor when the purpose for which it was paid has subsequently failed<sup>6</sup>.

1 *Chandler v Webster* [1904] 1 KB 493, CA. As to consideration in a contractual context see CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

2 'When one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise': *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 48, [1942] 2 All ER 122 at 129, HL, per Viscount Simon LC (applied in *Goss v Chilcott* [1996] AC 788, [1997] 2 All ER 110, PC). See also *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 924-925, 91 LGR 323 at 361-362 per Hobhouse J; *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, Aust HC.

3 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 924, 91 LGR 323 at 361 per Hobhouse J.

4 See Birks *An Introduction to the Law of Restitution* (1985) pp 223-226; Burrows, McKendrick and Edelman *Cases and Materials on the Law of Restitution* (2nd Edn, 2006) Ch 5.

5 *Chillingworth v Esche* [1924] 1 Ch 97, CA.

6 See eg *Essery v Cowlard* (1884) 26 ChD 191; *Re Garnett* (1905) 93 LT 117; *P v P* [1916] 2 IR 400, CA; *Re Ames' Settlement* [1946] Ch 217, [1946] 1 All ER 689 (gifts in anticipation of a marriage which did not take place or was subsequently declared to be a nullity); *Jacobs v Davis* [1917] 2 KB 532; *Cohen v Sellar* [1926] 1 KB 536 (return of engagement ring). See also, more generally, *Re the Trusts of the Abbott Fund* [1900] 2 Ch 326; *Re Gillingham Bus Disaster Fund* [1958] Ch 300, [1958] 1 All ER 37; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL; *Re West Sussex Constabulary Widows, Children and Benevolent Fund Trusts* [1971] Ch 1, [1970] 1 All ER 544; *Muschinski v Dodds* (1985) 160 CLR 583, Aust HC; *Re EVTR* [1987] BCLC 646, CA; *Barder v Caluori* [1988] AC 20, sub nom *Barder v Barder* [1987] 2 All ER 440, HL.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/6. TOTAL FAILURE OF CONSIDERATION/(1) INTRODUCTION/89. Discharge of the contract.

## 89. Discharge of the contract.

Where the claimant and the defendant are in a contractual relationship, the claimant can only recover money paid to the defendant upon a total failure of consideration where the contract between the parties has been discharged<sup>1</sup> or is otherwise unenforceable<sup>2</sup>. Where the contract remains on foot it governs the relationship between the parties<sup>3</sup> and there is no room for a restitutionary remedy<sup>4</sup>.

1 The contract may have been discharged on the ground that one party has accepted a repudiatory breach committed by the other party or because the contract has been frustrated: *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 KB 459 at 475, [1954] 1 All ER 779 at 786 per Devlin J. See also *Weston v Downes* (1778) 1 Doug KB 23; *Goodman v Pocock* (1850) 15 QB 576. As to consideration in a contractual context see further CONTRACT vol 9(1) (Reissue) PARA 727 et seq. As to the meaning of 'failure of consideration' see PARA 88 ante. As to discharge of a contract see CONTRACT vol 9(1) (Reissue) PARA 920 et seq.

2 Eg the contract between the parties may be void because of incapacity: see eg *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA. Quaere whether the ground of restitution in such a case is 'absence of consideration' or 'no consideration' rather than total failure of consideration: see PARA 104 post. Where the contract is unenforceable it may be necessary for the claimant to

show that the defendant was no longer ready, able and willing to perform his promise: *Thomas v Brown* (1876) 1 QBD 714; *Monnickendam v Leanse* (1923) 39 TLR 445.

3 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256, Aust HC, per Deane J; *Dimskal Shipping Co SA v International Transport Workers' Federation, The Evia Luck* [1992] 2 AC 152 at 165, [1991] 4 All ER 871 at 878, HL, per Lord Goff of Chieveley. See also *Weston v Downes* (1778) 1 Doug KB 23; *Davis v Street* (1823) 1 C & P 18. If the contract is divisible into separate parts, one part can be held to be unenforceable and restitution granted in relation to that part: see *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, Aust HC.

4 An exception to this rule may exist where the claim is brought by the party in breach for services rendered under the contract. Such a claim may lie even in the case where the innocent party elects not to terminate the contract as a result of the breach of the party who is now bringing the claim: see *Miles v Wakefield Metropolitan District Council* [1987] AC 539, [1987] 1 All ER 1089, HL; cf *Wiluszynski v Tower Hamlets London Borough Council* [1989] ICR 493, 88 LGR 14, CA.

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## **90. Scope of the claim.**

The claim to recover money paid upon a total failure of consideration<sup>1</sup> can arise in a number of different contexts. It can arise after the contract between the claimant and the defendant has been discharged as a result of a breach of contract committed by the defendant<sup>2</sup>, where the claimant seeks to recover from a third party beneficiary of a contract<sup>3</sup>, where the contract between the claimant and the defendant has been frustrated<sup>4</sup> and where the claimant seeks to recover money paid to the defendant under a contract which it is subsequently discovered was void<sup>5</sup>. An analogous principle would appear to operate where the party in breach of contract seeks to recover money paid to the innocent party prior to the discharge of the contract<sup>6</sup>.

1 As to the meaning of 'failure of consideration' see PARA 88 ante.

2 See PARAS 91-98 post.

3 See PARA 99 post.

4 See PARAS 100-103 post.

5 See PARAS 104-107 post.

6 See PARAS 108-110 post.

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## **(2) CONTRACTS DISCHARGED BY BREACH**

### **(i) Claim by the Innocent Party for the Recovery of Money Paid**

#### **91. Election.**

Where the total failure of consideration arises on the termination of a contract following a repudiatory breach of contract by the defendant<sup>1</sup>, the claimant may elect<sup>2</sup> either to bring a restitutionary claim to recover the money which has been paid to the defendant or to bring an

action for damages for breach of contract in the usual way<sup>3</sup>. The restitutionary claim enjoys procedural advantages over a claim for contractual damages<sup>4</sup> and, unlike a claim for contractual damages<sup>5</sup>, can be used to enable the claimant to escape from the consequences of having entered into a bad bargain<sup>6</sup>. However, the restitutionary claim, unlike the claim for damages for breach of contract, is confined to the recovery of the sum paid and cannot extend to the recovery of consequential losses or the loss of profits<sup>7</sup>.

1 As to the meaning of 'failure of consideration' see PARA 88 ante. As to consideration in a contractual context see further CONTRACT vol 9(1) (Reissue) PARA 727 et seq. As to discharge of contracts see CONTRACT vol 9(1) (Reissue) PARA 920 et seq.

2 There appears to be no English case directly in point but the High Court of Australia has held that a claimant cannot combine the claims and must elect between the restitutionary and the contractual claim: see *Baltic Shipping Co v Dillon*, *The Michael Lermontov* [1992] LRC (Comm) 724, (1993) 176 CLR 344. Alternatively, it may be that the true principle is that the claimant can combine the claims but cannot recover more than once for the same loss: see Treitel *The Law of Contract* (12th Edn, 2007) PARA 18-017 (citing *Millar's Machinery Co Ltd v David Way & Son* (1935) 40 Com Cas 204, CA, as an example of the combination of claims for restitution, reliance loss and loss of bargain).

3 As to the principles which govern a claim for damages for breach of contract see DAMAGES vol 12(1) (Reissue) PARA 941 et seq.

4 A claim for restitution is a claim for a liquidated sum, whereas a claim for contractual damages is a claim for an unliquidated sum.

5 *C & P Haulage v Middleton* [1983] 3 All ER 94, [1983] 1 WLR 1461, CA; *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, [1984] 3 All ER 298.

6 *Wilkinson v Lloyd* (1845) 7 QB 27; *Bush v Canfield* 2 Conn 485 (1818), Conn SC.

7 The claim to recover upon a total failure of consideration is analytically distinct from a claim for restitutionary damages following a breach of contract (as to which see PARA 159 post). In *A-G v Blake* [1998] Ch 439, [1998] 1 All ER 833, the Court of Appeal recognised (at 458 and 845 per Lord Woolf MR) that restitutionary damages could be recovered in the case of 'skimped performance', but, in the House of Lords, Lord Nicholls of Birkenhead suggested that the resolution of such cases 'may best be found elsewhere' (see [2001] 1 AC 268 at 286, [2000] 4 All ER 385 at 398). The remedy sought should be a part refund of the price agreed, not an account of profits.

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## 92. The meaning of 'total'.

The claim of the innocent party is one to recover upon a total failure of consideration; it does not arise where the failure is only partial<sup>1</sup>. When seeking to determine whether or not there has been a total failure of consideration, it is always necessary to analyse carefully the nature of the contract between the parties<sup>2</sup>. The task of the court is not to determine whether or not the claimant has received a specific benefit as a result of any performance on the part of the defendant but whether the defendant has performed any part of the contractual duties in respect of which the payment is due<sup>3</sup>. Therefore the fact that the claimant has enjoyed some benefit does not prevent there being a total failure of consideration provided that the benefit which the claimant obtained was not one for which he had bargained<sup>4</sup>. Similarly, the fact that the defendant has incurred significant expenditure in the performance of the contract does not mean that there has not been a total failure of consideration: if the defendant has not commenced performance of the obligation for which payment is to be made there is still a total

failure of consideration<sup>5</sup>. It can be a difficult task in certain cases to determine whether or not the failure of consideration has been total<sup>6</sup>.

1 As to partial failure see PARA 94 post. See also PARA 95 post. As to the meaning of 'failure of consideration' see PARA 88 ante. As to discharge of contracts see CONTRACT vol 9(1) (Reissue) PARA 920 et seq.

2 See eg *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 574, HL.

3 *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883 at 896, [1998] 1 WLR 574 at 588, HL, per Lord Goff of Chieveley; cf at 908 and 600 per Lord Lloyd of Berwick.

4 *Rowland v Divall* [1923] 2 KB 500, CA; *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA.

5 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL. Where the contract between the parties is one of sale, the buyer is contracting for ownership of the goods so that the failure of consideration is total where the buyer has not received any of the goods for which he contracted (even in the case where the seller has incurred significant expenditure in manufacturing the goods). Where, however, the contract is one for the manufacture and supply of goods, the failure of consideration will cease to be total once the defendant has begun the process of manufacture, whether or not the claimant has received any part of that performance: see *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29, [1980] 1 WLR 1129, HL. The distinction between a contract of sale and a contract for the design, construction and sale, while it may be a fine one in a given case, is therefore of fundamental importance in this context: see *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883 at 908, [1998] 1 WLR 574 at 600, HL, per Lord Lloyd of Berwick. See also *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA.

6 See PARA 95 post. For examples of cases in which it has been held that there has been a total failure of consideration see PARA 93 post. The cases cited in PARA 93 post are not confined to the situation where the claimant terminates the contract as a result of the defendant's repudiatory breach of contract. Rather, they provide general illustrations of the operation of the rule that money paid on a total failure of consideration is recoverable.

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### 93. Examples of a total failure of consideration.

There is a total failure of consideration where the claimant pays money for or under a lease which the defendant is unable to grant<sup>1</sup> and where a claimant pays rent to a defendant who has no title to the land and so is not entitled to receive the rent<sup>2</sup>. A claimant who pays money on a policy which is later avoided by the defendant on the ground that he was induced to enter into the contract by the claimant's innocent misrepresentation is entitled to recover the money so paid on the ground that the consideration for it has totally failed<sup>3</sup>. The result is similar with a claimant who advances money on the faith of an unstamped bill of exchange<sup>4</sup>. A payment of conduct money on a subpoena to defray the expenses of a journey where, the action being settled, no journey is ever made, is a payment the consideration for which has wholly failed<sup>5</sup>. So is a payment under an agreement to prosecute an action for an infringement of a patent where the action is never brought<sup>6</sup>, a payment on the faith of a contract to be made by the payer's agent where the agent never enters into a contract of the type which he was authorised to conclude<sup>7</sup>, a payment made in pursuance of a conditional contract where the condition is never fulfilled<sup>8</sup>, a payment made further to a contract which is terminated by the claimant on account of the defendant's repudiatory breach of contract at a time when the defendant has not performed any part of his obligations under the contract<sup>9</sup> or a payment made to the defendant where the defendant's death causes there to be a total failure of consideration<sup>10</sup>.

The following have also been held to be entitled to recover money paid on a total failure of consideration: a principal who paid money to brokers to purchase goods, where the brokers did not make the contract authorised<sup>11</sup>; bondholders who subscribed money for a purpose which failed<sup>12</sup>; and a claimant who advanced money under a scheme which proved abortive<sup>13</sup>. If a payment is made under a judgment which has become void<sup>14</sup>, or in respect of a worthless<sup>15</sup> or a forged instrument<sup>16</sup>, the amount paid may be recoverable on the ground of total failure of consideration.

1 *Wright v Colls* (1849) 8 CB 150. Where, however, the claimant has been let into possession of the land, he may be unable to recover the payment on the ground that the failure of consideration has not been total: *Hunt v Silk* (1804) 5 East 449; and see PARA 94 text and note 5 post. However, in each case it is necessary to examine what the payment was for. If (as in *Wright v Colls* supra) it was a premium for the lease itself, it will be recoverable if no lease is ever granted.

As to the meaning of 'failure of consideration' see PARA 88 ante.

2 *Newsome v Graham* (1829) 10 B & C 234.

3 *Anderson v Thornton* (1853) 8 Exch 425; and see *Skillett v Fletcher* (1867) LR 2 CP 469. The position is otherwise where the claimant's representation was made fraudulently: see *Anderson v Thornton* (1853) 8 Exch 425 at 428 per Parke B.

4 *Hamilton Finance Co Ltd v Coverley Westray Walbaum and Tosetti Ltd and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53.

5 *Martin v Andrews* (1856) 7 E & B 1.

6 *Templeman v E Cocquerel & Sons Ltd* (1913) 57 Sol Jo 405.

7 *Bostock v Jardine* (1865) 3 H & C 700.

8 *Wright v Newton* (1835) 2 Cr M & R 124 (failure of landlord of public house to give consent to change of tenancy).

9 *Giles v Edwards* (1797) 7 Term Rep 181; *Ehrensperger v Anderson* (1848) 3 Exch 148; but cf *Cooke v Munstone* (1805) 1 Bos & PNR 351.

10 *Knowles v Bovill* (1870) 22 LT 70.

11 *Bostock v Jardine* (1865) 3 H & C 700.

12 *Royal Bank of Canada v R* [1913] AC 283 at 296-297, PC. See also *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176, HL; *Wilson v Church* (1879) 13 ChD 1 at 49, CA, per Brett LJ. However, where a subscriber for ultra vires shares subsequently sells the shares to a third party, the subscriber cannot recover the money paid for the shares on the ground of total failure of consideration (*Linz v Electric Wire Co of Palestine Ltd* [1948] AC 371, [1948] 1 All ER 604, PC (criticised by Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 493 note 28)), although it may be possible for the subscriber in such a case to recover the payment made by analogy with *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL. Further, *Linz v Electric Wire Co of Palestine Ltd* supra was regarded as an 'anomalous' case in *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 at 240, [1998] 2 All ER 272 at 294, CA, per Robert Walker LJ.

13 *Nockels v Crosby* (1825) 3 B & C 814; *Moore v Garwood* (1849) 4 Exch 681; *Walstab v Spottiswoode* (1846) 15 M & W 501; and see *Mowatt v Lord Londesborough* (1854) 4 E & B 1; *Johnson v Goslett* (1857) 3 CBNS 569, Ex Ch; *Ward v Lord Londesborough* (1852) 12 CB 252; *Ashpittel v Sercombe* (1850) 5 Exch 147; *Kempson v Saunders* (1826) 4 Bing 5. Where the money has been applied for its purpose it cannot be recovered because in such a case there has been no failure of consideration: *Phillips v London School Board*, *Cockerton v London School Board* [1898] 2 QB 447, CA.

14 *Farrow v Mayes* (1852) 18 QB 516. So long as the judgment remains in force no action lies to recover money levied under it by reason that such judgment was obtained fraudulently or otherwise.

15 *Timmins v Gibbins* (1852) 18 QB 722. The person obtaining change in good faith for a cheque which proves worthless must bear the loss: *Timmins v Gibbins* supra at 726 per Lord Campbell CJ.

16 *Jones v Ryde* (1814) 5 Taunt 488; *Bruce v Bruce* (1814) 5 Taunt 495 (distinguishing *Price v Neal* (1762) 3 Burr 1354); *Wilkinson v Johnson* (1824) 3 B & C 428. See also the Bills of Exchange Act 1882 s 58(3) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1581); *Smith v Mercer* (1815) 6 Taunt 76; *Camidge v Allenby* (1827) 6 B & C 373; *Miller v Race* (1758) 1 Burr 452. The claimant cannot, however, recover where the fraud was perpetrated by his own agent (*Foster v Green* (1862) 7 H & N 881) or where the forgery does not render the instrument a nullity (*Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779 (forged bills of lading)). Notice must, however, have been given of the claim before the position of the person to whom payment has been made has become altered to his detriment: see *Cocks v Masterman* (1829) 9 B & C 902, explaining inter alia *Wilkinson v Johnson* supra. In *Cocks v Masterman* supra, delay in giving notice of the forgery prevented the claimant from recovering, the holder of a bill being entitled to know on the day it becomes due whether it will be honoured. This case was followed in *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7. See also *Pollard v Bank of England* (1871) LR 6 QB 623; *Turner v Stones* (1843) 1 Dow & L 122. The principle that delay in giving notice is a defence does not, however, apply to a Bank of England note: *Leeds and County Bank Ltd v Walker* (1883) 11 QBD 84 at 89.

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#### 94. Partial failure of consideration.

At common law<sup>1</sup>, the general rule<sup>2</sup> is that a partial failure of consideration does not suffice to generate a restitutionary claim to recover a proportionate part of the payment<sup>3</sup>. This principle was held to apply where a premium was paid for the purpose of learning a trade or profession and either the person paying or the person receiving the premium died before the period of tuition was completed<sup>4</sup>; where, under an agreement for a lease, a lessee paid a sum of money and went into possession for some days but afterwards quit the premises because the lessor failed to execute the lease within the agreed period<sup>5</sup>; where the purchaser of a patent paid the price and used the patent for some time, but it subsequently appeared that the patent was invalid<sup>6</sup>; where a passenger on a cruise ship paid for a two week cruise and enjoyed ten days of it before the vessel sank when it struck a shoal<sup>7</sup>; and where a hirer under a hire-purchase agreement kept the car for some six months before rejecting it on the ground of its defective condition<sup>8</sup>.

1 The position is sometimes otherwise as a result of the intervention of statute: see eg the Law Reform (Frustrated Contracts) Act 1943 s 1(2) where money paid is recoverable even upon a partial failure of consideration (see CONTRACT vol 9(1) (Reissue) PARA 914; and PARA 100 post). As to the meaning of 'failure of consideration' see PARA 88 ante. As to consideration in a contractual context see further CONTRACT vol 9(1) (Reissue) PARA 727 et seq. As to discharge of contracts see PARA 89 ante; and CONTRACT vol 9(1) (Reissue) PARA 920 et seq.

2 There are, however, a number of exceptions to the general rule and the courts seem to be moving slowly in the direction of recognising that a partial failure of consideration should suffice to generate a restitutionary claim: see eg Birks 'Failure of Consideration' in Rose (Ed) *Consensus Ad Idem: Essays on the Law of Contract in Honour of Guenter Treitel* (1996). See also Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 495-496.

3 *Learoyd v Brook* [1891] 1 QB 431 at 434-435 per AL Smith LJ; *Colton v Dorrell* (1869) 17 WR 672 (agreement for lease, and tenant let into possession pending completion). See also *Whincup v Hughes* (1871) LR 6 CP 78; *Blakeley v Muller & Co* [1903] 2 KB 760n; *Lumsden v Barton & Co* (1902) 19 TLR 53; *Nicholson v Ricketts* (1860) 2 E & E 497; *Tyrie v Fletcher* (1777) 2 Cowp 666; *Kwei Tek Chao v British Traders Ltd* [1954] 2 QB 459 at 475-477, [1954] 1 All ER 779 at 787-788 per Devlin J; *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] NLJR 1504, (1995) Times, 21 July, CA. For cases of express agreement see *Hurst v Orbell* (1838) 8 Ad & El 107; *Derby v Humber* (1867) LR 2 CP 247. Cf *Wright v Newton* (1835) 2 Cr M & R 124; *Devaux v Conolly* (1849) 8 CB 640.

4 *Whincup v Hughes* (1871) LR 6 CP 78; *Ferns v Carr* (1885) 28 ChD 409. The court, in the exercise of its summary jurisdiction over its own officers, may order a solicitor to return a portion of the premium paid in respect of an articulated clerk, on the premature termination of the articles: *Ex p Pranker* (1819) 3 B & Ald 257; *Re Harper, ex p Bayley* (1829) 9 B & C 691; *Re Thompson* (1848) 1 Exch 864. For the effect of death as an

event which operates to frustrate a personal contract see CONTRACT vol 9(1) (Reissue) PARA 903. As to the rights of an employee on the bankruptcy of his employer see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 582.

5 *Hunt v Silk* (1804) 5 East 449.

6 *Taylor v Hare* (1805) 1 Bos & PNR 260; and see *Lawes v Purser* (1856) 6 E & B 930.

7 *Baltic Shipping v Dillon, The Mikhail Lermontov* (1993) 176 CLR 344, [1992] LRC (Comm) 724, Aust HC.

8 *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, [1961] 2 All ER 281, CA. The position is otherwise where the ground on which the vehicle is rejected is that the vendor had no title to sell the car. In such a case, the claimant may be able to recover back the payments made to the vendor on the ground of total failure of consideration notwithstanding the fact that the claimant has enjoyed substantial intermediate use of the vehicle: *Rowland v Divall* [1923] 2 KB 500, CA; *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286.

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## 95. Distinguishing between a total and a partial failure of consideration.

The task of distinguishing between a total and a partial failure of consideration is not always an easy one; it depends in each case upon a careful construction of the contract between the parties<sup>1</sup>. For example, in a contract for the sale of an estate in land, a total failure of consideration will occur if the purchaser cannot obtain a valid conveyance, and so he may recover any purchase money paid to the vendor<sup>2</sup>; but if he has merely purchased an estate with a defective or imperfect title then the failure of consideration is only partial and, whatever other remedy may be open to him, he cannot recover the money paid on the ground that it was paid for a consideration which had wholly failed<sup>3</sup>. Similarly, in the case of a contract of sale where the buyer contracts to acquire the ownership of certain goods, there may be a total failure of consideration if the goods have ceased to exist at the time the contract of sale was concluded<sup>4</sup>, or if the goods were not the property of the seller and consequently property does not pass to the buyer<sup>5</sup>, or if for other reasons the buyer fails to obtain the possession of and property in the goods<sup>6</sup>, or if the goods are substantially different from those which the buyer contracted to buy<sup>7</sup>.

The fact that money paid by the buyer can be recovered upon a total failure of consideration is not designed to relieve persons from the results of bad bargains or to defeat the operation of the maxim caveat emptor<sup>8</sup>. Thus if, in the case of a contract for the sale of goods, under which property passes immediately, the goods perish before delivery, the price is not recoverable by the buyer, for there is no total failure of consideration<sup>9</sup>. Likewise, if a thing sold is not substantially different from that contracted for, but merely lacks some quality which will give rise to an action for breach of warranty, the remedy is for the breach of warranty and an action for the recovery of the whole price is not maintainable<sup>10</sup>. An initial payment made under a hire-purchase agreement 'in consideration of the option to purchase' is not recoverable by the hirer when the finance company validly terminates the agreement between them and so prevents the hirer from exercising the option<sup>11</sup> but payments made by the hirer can be recovered should it transpire that the finance company never had any title to the goods which were the subject of the contract of hire-purchase<sup>12</sup>.

1 *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 574, HL. As to the meaning of 'failure of consideration' see PARA 88 ante. As to consideration in a contractual context see further CONTRACT

vol 9(1) (Reissue) PARA 727 et seq. As to discharge of contracts see PARA 89 ante; and CONTRACT vol 9(1) (Reissue) PARA 920 et seq.

2 *Johnson v Johnson* (1802) 3 Bos & P 162; *Cripps v Reade* (1796) 6 Term Rep 606. See also *Bree v Holbech* (1781) 2 Doug KB 654; *Simmons v Heseltine* (1858) 5 CBNS 554; *Newsome v Graham* (1829) 10 B & C 234.

3 *Johnson v Johnson* (1802) 3 Bos & P 162; *Clare v Lamb* (1875) LR 10 CP 334. See also *Stray v Russell* (1859) 1 E & E 888 (affd (1860) 1 E & E 916, Ex Ch); *Begbie v Phosphate Sewage Co* (1876) 1 QBD 679, CA; *Thomas v Brown* (1876) 1 QBD 714; *Ashworth v Mounsey* (1853) 9 Exch 175; *Beavan v M'Donnell* (1854) 9 Exch 309.

4 See CONTRACT vol 9(1) (Reissue) PARA 894. See also MISTAKE vol 77 (2010) PARA 19 et seq; SALE OF GOODS AND SUPPLY OF SERVICES.

5 See *Rowland v Divall* [1923] 2 KB 500, CA; *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286.

6 *Wilkinson v Lloyd* (1845) 7 QB 27; *Hudson v Robinson* (1816) 4 M & S 475; *Kempson v Saunders* (1826) 2 C & P 366. See also *Dutch v Warren* (1720) 1 Stra 406; and cf *Mackusick v Fleming* (1904) 73 LJ Ch 826, HL.

7 *Gurney v Womersley* (1854) 4 E & B 133; *Gompertz v Bartlett* (1853) 2 E & B 849; *Young v Cole* (1837) 3 Bing NC 724; and see *Lamert v Heath* (1846) 15 M & W 486.

8 *Bree v Holbech* (1781) 2 Doug KB 654; *Clare v Lamb* (1875) LR 10 CP 334; *Griffin v Caddell* (1875) IR 9 CL 488.

9 *Rugg v Minett* (1809) 11 East 210. See also the Sale of Goods Act 1979 s 20 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 142.

10 *Street v Blay* (1831) 2 B & Ad 456 at 462; *Gompertz v Denton* (1832) 1 Cr & M 207. In addition, by statute, the breach of warranty may be set up against the seller in diminution or extinction of the price: see the Sale of Goods Act 1979 s 53 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 307 et seq.

11 *Kelly v Lombard Banking Co Ltd* [1958] 3 All ER 713, [1959] 1 WLR 41, CA.

12 See eg *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286.

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## 96. Partial failure of consideration and divisible contracts.

Where the contract between the parties consists of a number of divisible obligations and the payment made by the claimant can be related to a divisible obligation in respect of which there has been no performance at all, then the part of the consideration which can be attributed to that obligation can be recovered on the ground that the consideration for that payment has failed<sup>1</sup>. Thus where there is an order for goods at so much per ton or piece, and there is short delivery, the contract may be regarded as divisible and any excess prepayment recovered on the ground that there has been a total failure of consideration<sup>2</sup>. Similarly, where one party is found to have overpaid the other for work done by that person, the court may conclude that there has been a total failure of consideration for the overpayment<sup>3</sup>.

1 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 77, [1942] 2 All ER 122 at 144, HL, per Lord Porter. See also *Rover International v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA, where it was held that a claim for total failure of consideration was not prevented where the making of profits was not achieved, although delivery and possession occurred. It has been suggested that this case could be re-interpreted as a case in which restitution was allowed upon the ground of partial failure of

consideration: Burrows *The Law of Restitution* (2nd Edn, 2002) pp 329-330. As to divisible contracts see CONTRACT vol 9(1) (Reissue) PARA 922. As to the meaning of 'failure of consideration' see PARA 88 ante. As to consideration in a contractual context see further CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

2 *Devaux v Conolly* (1849) 8 CB 640; *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93, CA; *Behrend & Co Ltd v Produce Brokers Co Ltd* [1920] 3 KB 530; *Ebrahim Dawood Ltd v Heath (Est 1927) Ltd* [1961] 2 Lloyd's Rep 512. It is possible that the courts may be prepared to apportion the consideration as a matter of law (ie irrespective of whether or not the parties themselves have sought to apportion the consideration) where the apportionment exercise can be carried out without difficulty: see *Goss v Chilcott* [1996] AC 788 at 798, [1997] 2 All ER 110 at 117, PC; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 375, Aust HC; *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch) at [63], [2003] 2 All ER (Comm) 823 at [63] per Nicholas Strauss QC (sitting as a deputy judge of the High Court). See further PARA 98 post.

3 *DO Ferguson & Associates v Sohl* (1992) 62 BLR 95.

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## 97. Statutory right to recover upon a partial failure of consideration.

Legislation may allow the recovery of money upon a partial failure of consideration<sup>1</sup>. For example, where a partnership is prematurely determined, there is a statutory power for the court to order the return of part or all of a premium paid by a partner for admission to the firm<sup>2</sup>; and where a contract has been discharged on the ground of frustration money paid prior to the occurrence of the frustrating event may generally be recovered (subject to a claim or set-off for expenses by the payee) even though there has only been a partial failure of consideration<sup>3</sup>.

1 See PARAS 94-96 ante. As to consideration in a contractual context see further CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

2 See the Partnership Act 1890 s 40; and PARTNERSHIP vol 79 (2008) PARAS 192, 193.

3 See the Law Reform (Frustrated Contracts) Act 1943 s 1(2); *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 938, [1979] 1 WLR 783 at 800 per Robert Goff J (in this respect reversing the rule laid down at common law in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL); para 100 post; and CONTRACT vol 9(1) (Reissue) PARAS 913-914.

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## 98. A wider exception.

There are indications that the courts will be prepared to countenance an action based on a partial failure of consideration, at least in those cases where apportionment can be carried out without difficulty<sup>1</sup>. Further, it has been said that the 'recognition of the principle of unjust enrichment in English law may lead to reconsideration of the requirement that the failure of consideration be total'<sup>2</sup>.

1 *Goss v Chilcott* [1996] AC 788 at 798, [1997] 2 All ER 110 at 117, PC; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 375, Aust HC; *Westdeutsche Landesbank Girozentrale*

*v Islington London Borough Council* [1996] AC 669 at 682-683, [1996] 2 All ER 961 at 967-968, HL, per Lord Goff of Chieveley. However, in *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 574, HL, the requirement that the failure of consideration must be total was not challenged, and it was accepted by the Court of Appeal in *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] NLJR 1504, (1995) Times, 21 July, CA. See also *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch) at [63], [2003] 2 All ER (Comm) 823 at [63] per Nicholas Strauss QC (sitting as a deputy judge of the High Court).

2 See Chitty on Contracts (29th Edn, 2004) PARA 29-062. There are a number of arguments which support the proposition that a partial failure of consideration should suffice to generate a restitutionary claim. The distinction between a total and a partial failure can be extremely fine (see the cases cited in PARA 95 ante). Cases can be found in which the courts have strained to find the existence of a total failure of consideration: see eg *Rowland v Divall* [1923] 2 KB 500, CA; *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA; *DO Ferguson & Associates v Sohl* (1992) 62 BLR 95, CA. Statute has recognised the existence of a claim to recover upon a partial failure of consideration: see PARA 97 ante. The defences can be relied upon to keep liability within acceptable bounds (in particular the defences of change of position: see PARA 166 et seq post). The claimant must be able and willing to make counter-restitution to the defendant: see PARA 173 post. Furthermore, in claims to recover the reasonable value of services rendered, the courts do not refuse to allow the claimant to bring a restitutionary claim where the defendant has paid some part of the price.

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## **(ii) Restitution from a Third Party Beneficiary of a Contract**

### **99. Failure of consideration and third parties.**

Where, in the performance of a contract with another party, a claimant confers a benefit on a third party, the claimant cannot generally recover from that third party the value of the benefit so conferred in the event of the contracting party failing to perform the service in return for which the claimant conferred the benefit on the third party<sup>1</sup>. The claimant must instead look to its contracting party for a remedy under the contract<sup>2</sup>. There may, however, be some 'exceptional circumstances' in which the claimant may be able to recover upon a total failure of consideration from the third party even although the third party was not expected to provide any consideration for the benefit conferred by the claimant<sup>3</sup>.

1 *Pan Ocean Shipping Co Ltd v Creditcorp Ltd, The Trident Beauty* [1994] 1 All ER 470, [1994] 1 WLR 161, HL. See Burrows [1994] RLR 52.

2 The 'agreed contractual regime' between the contracting parties is likely to render 'the imposition by the law of a remedy in restitution both unnecessary and inappropriate': *Pan Ocean Shipping Co Ltd v Creditcorp Ltd, The Trident Beauty* [1994] 1 All ER 470 at 473, [1994] 1 WLR 161 at 164, HL, per Lord Goff of Chieveley. Where, however, the contract is later discovered never to have been binding or to have been discharged, eg on the ground of frustration, the position is otherwise and the claimant may be able to bring a restitutionary claim against the third party: see *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 AC 494, 90 LJB 1068, HL. See also the Law Reform (Frustrated Contracts) Act 1943; para 100 post; and CONTRACT vol 9(1) (Reissue) PARA 897 et seq.

3 *Pan Ocean Shipping Co Ltd v Creditcorp Ltd, The Trident Beauty* [1994] 1 All ER 470 at 475, [1994] 1 WLR 161 at 166, HL, per Lord Goff of Chieveley. As to the meaning of 'failure of consideration' see PARA 88 ante.

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### (3) CONTRACTS DISCHARGED BY FRUSTRATION

#### 100. Recovery of money paid.

The restitutionary consequences of the frustration<sup>1</sup> of a contract are governed largely<sup>2</sup> by the Law Reform (Frustrated Contracts) Act 1943<sup>3</sup>. Money paid prior to the discharge of the contract<sup>4</sup> is recoverable, sums payable prior to the discharge of the contract cease to be payable, and the court has a discretion to allow the payee to set-off against the sums so paid or payable expenses which he has incurred before the time of discharge in, or for the purpose of, the performance of the contract<sup>5</sup>. The discretion given to the court is a 'broad'<sup>6</sup> one and is not confined to the imposition of an 'all-or-nothing' solution<sup>7</sup>. The task of the court is 'to do justice in a situation which the parties had neither contemplated nor provided for, and to mitigate the possible harshness of allowing all loss to lie where it has fallen'<sup>8</sup>. The onus of proof is upon the payee to show that it is just in all the circumstances of the case for him to retain any part of the prepayment<sup>9</sup>.

1 The Law Reform (Frustrated Contracts) Act 1943 does not define frustration; on that point resort must be had to the common law (see CONTRACT vol 9(1) (Reissue) PARA 897 et seq). The Act applies specifically where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract: see s 1(1); and CONTRACT vol 9(1) (Reissue) PARA 913. One point of doubt is whether the Law Reform (Frustrated Contracts) Act 1943 applies to contracts which are affected by supervening illegality, but it would seem that the Act does apply to such contracts (see Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 557). However, the Law Reform (Frustrated Contracts) Act 1943 does not apply to contracts which are discharged by breach, which are discharged under an express term of the contract or which are initially impossible of performance.

2 The Law Reform (Frustrated Contracts) Act 1943 does not apply to: (1) any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea; (2) any contract of insurance; and (3) any contract to which the Sale of Goods Act 1979 s 7 applies or any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished: Law Reform (Frustrated Contracts) Act 1943 s 2(5) (amended by the Sale of Goods Act 1979 s 63, Sch 2 para 2); and see CONTRACT vol 9(1) (Reissue) PARA 919. So, for example, the recovery of advance freight continues to be governed by a rule 'analogous to what we all know as the rule in *Chandler v Webster* [1904] 1 KB 493, CA': see *Compania Naviera General SA v Kerametal Ltd, The Lorna I* [1981] 2 Lloyd's Rep 559 at 560 per Robert Goff J; affd [1983] 1 Lloyd's Rep 373, CA. See also *Vagres Compania Maritima SA v Nissho-Iwai American Corpn, The Karin Vatis* [1988] 2 Lloyd's Rep 330, CA. The common law rule was that the money was recoverable upon a total failure of consideration: *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL, in which the decision of the Court of Appeal in *Chandler v Webster* supra, where it was held that the loss caused by the frustrating event essentially lay where it fell, was overruled (see CONTRACT vol 9(1) (Reissue) PARA 912). In relation to services rendered or goods supplied under a contract which was later frustrated, the position of the claimant was a difficult one as a result of the operation of the entire contracts or entire obligation rule: see *Appleby v Myers* (1867) LR 2 CP 651, Ex Ch; and PARA 117 post.

3 See CONTRACT vol 9(1) (Reissue) PARAS 913-919. See also Chitty on Contracts (29th Edn, 2004) PARAS 23-068-23-096.

4 Where the payment is made after the time of discharge, the money paid will only be recoverable if the payor can establish another ground of restitution, such as mistake, either of fact (that the payor was unaware of the occurrence of the frustrating event) or of law (that the payor, while aware of the event, did not know that it constituted a frustrating event). As to discharge of contracts see PARA 89 ante; and CONTRACT vol 9(1) (Reissue) PARA 920 et seq.

5 See the Law Reform (Frustrated Contracts) Act 1943 s 1(2); and CONTRACT vol 9(1) (Reissue) PARA 914.

6 *Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226 at 1237, [1995] EMLR 263 at 277 per Garland J (contract for concert frustrated when venue declared unsafe; it was held that the promoter could recover advance payments made to musicians without any deduction being made under the proviso).

7 *Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226 at 1237, [1995] EMLR 263 at 277 per Garland J; cf *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 707, [1981] 1 All ER 161 at 181, HL, per Lord Simon of Glaisdale.

8 *Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226 at 1237, [1995] EMLR 263 at 277 per Garland J. See also *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 800, where Robert Goff J stated that the proviso operated as a 'statutory recognition of the defence of change of position'. As to change of position see PARAS 166-169 post.

9 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 707, [1981] 1 All ER 161 at 180, HL, per Lord Simon of Glaisdale. See also *Lobb v Vasey Housing Auxiliary* [1963] VR 239. It is likely to be difficult for a payee to satisfy the onus of proof where his expenditure resulted in a product which he could use in the performance of another contract: see eg *Davis and Primrose Ltd v Clyde Shipbuilding and Engineering Co Ltd* 1917 1 SLT 297.

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### 101. Non-monetary benefits.

Where one party to the contract has conferred upon the other party a 'valuable benefit' (other than a payment of money<sup>1</sup>) before the time of discharge<sup>2</sup> he is entitled to recover a just sum which cannot exceed the value of the benefit which he has conferred<sup>3</sup>. The court must first identify the benefit and then value it<sup>4</sup>. In an appropriate case the value of the benefit is to be identified with the end product of the service rather than the value of the services themselves<sup>5</sup>. However, it is possible to have regard to the services themselves where the service, by its very nature, does not result in an end product<sup>6</sup> and also where the service results in an end product which has no objective value<sup>7</sup>. The benefit, usually the end product, must then be valued and, when carrying out that valuation exercise, the court must not take into account the time value of money so that the benefit must be valued at the date of the frustrating event, without regard to the money which the defendant may have obtained by selling the benefit before the date of the frustrating event<sup>8</sup>, although interest may be awarded on a sum in respect of which judgment is given under the Law Reform (Frustrated Contracts) Act 1943<sup>9</sup>. The benefit must be valued as at the date of the frustrating event<sup>10</sup>. Expenses incurred must be deducted from the valuable benefit and not from the just sum<sup>11</sup>. The court has a broad discretion when assessing the just sum<sup>12</sup>. Generally, the assessment undertaken by the court will be similar to that undertaken by a court in a quantum meruit claim<sup>13</sup>. The contractual allocation of risk is likely to be an important factor in the assessment of a just sum<sup>14</sup> and so it is likely<sup>15</sup> that in most cases the claimant's claim will be limited to a rateable proportion of the contract price.

1 A claim to recover money is governed by the Law Reform (Frustrated Contracts) Act 1943 s 1(2): see PARA 100 ante; and CONTRACT vol 9(1) (Reissue) PARA 914.

2 Where the benefit has been conferred after the time of discharge, the Law Reform (Frustrated Contracts) Act 1943 is inapplicable. The claimant may, however, be able to recover in contract where the parties entered into a fresh contract in relation to the provision of the goods or services. Alternatively, the claimant may be able to bring a restitutionary claim where he can show that the defendant freely accepted the goods in the knowledge that the claimant was not carrying out the service or delivering the goods gratuitously. See eg *Société Franco Tunisienne d'Armement v Sidermar SpA, The Massalia* [1961] 2 QB 278, [1960] 2 All ER 529 (freight was payable on basis of quantum meruit where charterparty was frustrated by closing of specified route and ship-owners carried by another route with charterers' consent); overruled on the ground that there was no frustration in *Ocean Tramp Tankers Corp v V/O Sovfracht, The Eugenia* [1964] 2 QB 226, [1964] 1 All ER 161, CA. See also *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 41 ALR 367.

3 See the Law Reform (Frustrated Contracts) Act 1943 s 1(3); and CONTRACT vol 9(1) (Reissue) PARA 915.

4 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 940, [1979] 1 WLR 783 at 802 per Robert Goff J; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL.

5 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 940, [1979] 1 WLR 783 at 802 per Robert Goff J; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL. There is thus no benefit to value where the end product of the services is destroyed by the frustrating event: *BP Exploration Co (Libya) Ltd v Hunt (No 2)* supra at 940 and 803 per Robert Goff J. See also *Parsons Bros Ltd v Shea* (1965) 53 DLR (2d) 86. Thus no claim under the Law Reform (Frustrated Contracts) Act 1943 would arise in a case such as *Appleby v Myers* (1867) LR 2 CP 651.

6 Eg 'where the services consist of doing such work as surveying, or transporting goods': see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 939, [1979] 1 WLR 783 at 802 per Robert Goff J; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL.

7 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 939, [1979] 1 WLR 783 at 802 per Robert Goff J; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL.

8 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 940, [1979] 1 WLR 783 at 802 per Robert Goff J; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL.

9 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 941, [1979] 1 WLR 783 at 803-804 per Robert Goff J; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL. The court has power to make an award for compound interest where the claimant seeks a restitutionary remedy for the time value of money paid under a mistake: see *Sempre Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34, [2007] 3 WLR 354; and PARA 23 ante.

10 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 966, [1979] 1 WLR 783 at 836 per Robert Goff J; affd [1983] 2 AC 352 at 373, [1982] 1 All ER 925 at 992, HL, per Lord Brandon of Oakbrook.

11 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 941, [1979] 1 WLR 783 at 804 per Robert Goff J; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL.

12 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 980, [1981] 1 WLR 232 at 238, CA, per Lawton LJ; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL.

13 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 942, [1979] 1 WLR 783 at 805 per Robert Goff J; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL. As to quantum meruit see PARA 113 et seq post.

14 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 942, [1979] 1 WLR 783 at 805 per Robert Goff J; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL.

15 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 942, [1979] 1 WLR 783 at 805 per Robert Goff J; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL.

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## 102. Severability and contracting out.

Where the contract can be divided into severable and distinct obligations, the Law Reform (Frustrated Contracts) Act 1943 does not apply to any obligation which has been completely performed<sup>1</sup>. The Act does, however, apply to those several obligations which have not been completely performed<sup>2</sup>. It is open to the parties to contract out of the remedial provision made by the Act<sup>3</sup>. In deciding whether or not the parties have contracted out of the Act a court will apply ordinary principles of construction<sup>4</sup>, but it has also been said that unless the provision is clear<sup>5</sup> the courts will be careful before drawing the inference that the clause was intended to be applicable in such radically changed circumstances. A clause in a contract which imposes on one party an obligation to maintain insurance against the occurrence of a frustrating event would appear to be effective to exclude the operation of the Act so that the party upon whom the obligation to insure is imposed cannot bring a claim under the Act<sup>6</sup>. The fact that payment for the work is not due until the completion of the work does not automatically<sup>7</sup> preclude an award of damages under the Act. The effect of excluding the Act is to re-instate the common

law rules<sup>8</sup> unless the parties have made some other provision for the consequences of the frustration of the contract in the contract itself.

1 See the Law Reform (Frustrated Contracts) Act 1943 s 2(4); and CONTRACT vol 9(1) (Reissue) PARA 916.

2 In this respect, the Law Reform (Frustrated Contracts) Act 1943 departs from the common law rule laid down in *Stubbbs v Holywell Rly Co* (1867) LR 2 Exch 311.

3 See the Law Reform (Frustrated Contracts) Act 1943 s 2(3); and CONTRACT vol 9(1) (Reissue) PARA 917.

4 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 943, [1979] 1 WLR 783 at 806 per Robert Goff J.

5 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 960, [1979] 1 WLR 783 at 829 per Robert Goff J. Where the event which has occurred is particularly devastating a court may be slow to conclude that the parties intended the clause to operate in the circumstances which have occurred (as in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* supra).

6 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 943, [1979] 1 WLR 783 at 807 per Robert Goff J. However, in considering whether any sum ought to be recovered or retained by any party to the contract the court must not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment: see the Law Reform (Frustrated Contracts) Act 1943 s 1(5); and CONTRACT vol 9(1) (Reissue) PARA 918.

7 See note 6 supra.

8 See the rules laid down by the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL, relating to total failure of consideration: see CONTRACT vol 9(1) (Reissue) PARA 912.

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### **103. Prior breach of contract.**

Where the claimant has, prior to the occurrence of the frustrating event, broken the terms of the contract between the claimant and the defendant, the defendant may have an accrued right to damages which may be the subject of a set-off or counterclaim<sup>1</sup>.

1 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 944, [1979] 1 WLR 783 at 808 per Robert Goff J. The prior breach by the claimant has no other impact upon the operation of the Law Reform (Frustrated Contracts) Act 1943 s 1(2) or (3) (see PARAS 100-101 ante; and CONTRACT vol 9(1) (Reissue) PARAS 914-915): *BP Exploration Co (Libya) Ltd v Hunt (No 2)* supra at 944 and 808 per Robert Goff J. As to frustration see further CONTRACT vol 9(1) (Reissue) PARA 897 et seq.

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## **(4) VOID CONTRACTS**

### **104. Absence of consideration.**

Money<sup>1</sup> paid by the claimant to the defendant under a contract which is void ab initio may be recoverable either on the ground that there has been a total failure of consideration for the payment or on the ground that there has been an 'absence of consideration'<sup>2</sup> or 'no consideration'<sup>3</sup> for the payment. There may be a total failure of consideration where the claimant is held to have bargained for a legally enforceable obligation to make counter-performance and the contract is discovered to be void so that there is no legally enforceable obligation to render counter-performance<sup>4</sup>. In such a case, the fact that the defendant has performed his obligations as a matter of fact does not prevent there being a total failure of consideration because the performance required of the defendant is one which is legally enforceable<sup>5</sup>. Alternatively<sup>6</sup>, the claimant may be able to recover the money paid on the ground of 'absence of' or 'no' consideration<sup>7</sup>. Money paid can be recovered even though there has been partial<sup>8</sup> or even complete<sup>9</sup> performance of the void contract. Recovery will, however, be denied where the effect of allowing the claimant to recover the money paid would be to undermine the rule or the statute which rendered the contract void in the first place<sup>10</sup>.

1 A similar principle operates where services are provided or goods transferred: see PARA 121 post.

2 For the modern origin of 'absence of consideration' see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 924-930, 91 LGR 323 at 361-369 per Hobhouse J; affd [1994] 1 WLR 938 at 944-947 per Dillon LJ, and at 952-953 per Leggatt LJ, CA. But in *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215, [1998] 2 All ER 272, CA, Morritt LJ concluded that the decision of the Court of Appeal in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* supra was authority for the proposition that the ground of recovery was total failure of consideration. The House of Lords found it unnecessary to consider the point. As to the meaning of 'failure of consideration' see PARA 88 ante. As to consideration in a contractual context see further CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

3 This phrase was used in *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL, by both Lord Goff of Chieveley (at 166 and 754) and Lord Browne-Wilkinson (at 197 and 781-782). The phrase 'absence of consideration' was adopted by Hobhouse J in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 924, 91 LGR 323 at 361. See also the references to *condictio indebiti* in *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49 at [21] and [23], [2007] 1 AC 558 at [21] and [23], [2007] 1 All ER 449 at [21] and [23] per Lord Hoffmann, and at [150]-[158] per Lord Walker of Gestingthorpe. Earlier cases which appear to lend support to 'no consideration' include *Hicks v Hicks* (1802) 3 East 16; *Brougham v Dwyer* (1913) 108 LT 504; *North Central Wagon Finance Co Ltd v Brailsford* [1962] 1 All ER 502, [1962] 1 WLR 1288. Other cases in which the language of 'no consideration' has been used include *Re Phoenix Life Assurance Co* (1862) 2 John & H 441 at 448; *Flood v Irish Provident Assurance Co Ltd* [1912] 2 Ch 597n at 600, 1r CA.

4 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 710, [1996] 2 All ER 961 at 993, HL, per Lord Browne-Wilkinson; *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215, [1998] 2 All ER 272, CA. This seems to come close to a generalised application of the approach in *Rowland v Divall* [1923] 2 KB 500, CA. See also *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL.

5 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 710, [1996] 2 All ER 961 at 993, HL, per Lord Browne-Wilkinson. See also *Re Phoenix Life Assurance Co* (1862) 2 John & H 441.

6 The claimant is not required to choose between the two grounds; both can be advanced before the court.

7 However, it should be noted that neither 'absence of consideration' nor 'no consideration' has received the approval of the House of Lords. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 683, [1996] 2 All ER 961 at 967, HL, Lord Goff of Chieveley, after noting the criticisms levelled against 'absence of consideration' as a ground of restitution, expressed the view that the ground for restitution might have been a failure of consideration. See also *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558, [2007] 1 All ER 449; and note 3 supra. It has also been the subject of heavy academic consideration (see eg Birks (1993) 23 Univ of Western Australia Law Rev 195; Swadling 'Restitution for No Consideration' [1994] RLR 73; Burrows 'Swaps and the Friction between Common Law and Equity' [1995] RLR 15) to which Lord Goff of Chieveley made reference in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* supra.

8 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL.

9 *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215, [1998] 2 All ER 272, CA; cf *Davis v Bryan* (1827) 6 B & C 651.

10 See eg *Orakpo v Manson Investments Ltd* [1978] AC 95, [1977] 3 All ER 1, HL; and the case of illegal contracts. The fact that an illegal contract is void does not entitle the claimant to the recovery of benefits conferred in performance of the illegal contract. A restitutionary claim is not necessarily inconsistent with the policy which rendered the contract void: see eg *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL, in so far as it overruled the decision of the House of Lords in *Sinclair v Brougham* [1914] AC 398, HL.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/6. TOTAL FAILURE OF CONSIDERATION/(4) VOID CONTRACTS/105. Examples of recovery of money paid under a void contract.

### 105. Examples of recovery of money paid under a void contract.

There are a number of examples of the recovery of money paid under a void contract<sup>1</sup>. A company, which paid money to the defendant under a distributorship agreement which was void because the company had not been incorporated at the time of entry into the contract, was held to be entitled to recover the money so paid<sup>2</sup>; as was a company which paid money to a director under a contract which was void for want of authority<sup>3</sup>. A local authority which paid money to a bank under an interest rate swap which was void because it was ultra vires was held to be entitled to recover the money so paid<sup>4</sup>; as was a bank which paid money to a local authority under an ultra vires interest rate swap<sup>5</sup>. Money paid under a loan which is ultra vires is probably recoverable<sup>6</sup>. Money paid under a void annuity contract has been held to be recoverable<sup>7</sup>; as has money advanced on a bill of sale which was void either because it did not comply with the formality requirements or because it had not been registered<sup>8</sup>. Premiums paid under an insurance contract which was void because it was beyond the powers of the insurance company to enter into such a transaction have been held to be recoverable<sup>9</sup>, and so have premiums paid under marine insurance policies which were void because they were held to be wagers<sup>10</sup>. Money paid under a contract which is void for mistake is recoverable<sup>11</sup>.

1 However, it is a matter of some controversy whether the ground on which restitution is ordered in these cases is the fact that the contract is void or whether it is one of the standard grounds of restitution such as (total) failure of consideration or mistake: see generally Virgo *The Principles of the Law of Restitution* (2nd Edn, 2006) pp 387-399; Birks (1993) 23 Univ of Western Australia Law Rev 195.

2 *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA, where the ground on which the money was held to be recoverable was not simply that the contract was void; the money paid was recoverable on the ground that it had been paid under a mistake of fact and on the ground that there had been a total failure of consideration.

3 *Guinness plc v Saunders* [1990] 2 AC 663, [1990] 1 All ER 652, HL (although the precise ground on which restitution was ordered is unclear: see Birks 'Restitution Without Counter-Restitution: Guinness plc v Saunders' [1990] LMCLQ 330).

4 *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545. An alternative ground on which the local authority may seek recovery of the money paid is that the money was paid under a mistake of law: see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; and PARA 36 ante.

5 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL; *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215, [1998] 2 All ER 272, CA.

6 In the past the courts denied recovery under the authority of *Sinclair v Brougham* [1914] AC 398, HL, but today the courts would probably allow recovery under the authority of *Westdeutsche Landesbank Girozentrale v*

*Islington London Borough Council* [1996] AC 669 at 710-711, [1996] 2 All ER 961 at 993-994, HL, per Lord Browne-Wilkinson.

7 *Shove v Webb* (1787) 1 Term Rep 732; *Hicks v Hicks* (1802) 3 East 16. As to the similar position in equity see *Byne v Vivian* (1800) 5 Ves 604; *Hoffman v Cooke* (1801) 5 Ves Jun 623; *Bromley v Holland* (1802) Coop G 9. Cf *Davis v Bryan* (1827) 6 B & C 651.

8 *Davies v Rees* (1886) 17 QBD 408, CA; *Smith v Whiteman* [1909] 2 KB 437, CA; *Bradford Advance Co Ltd v Ayers* [1924] WN 152; *North Central Wagon Finance Co Ltd v Brailsford* [1962] 1 All ER 502, [1962] 1 WLR 1288.

9 *Re Phoenix Life Assurance Co* (1862) 2 John & H 441; *Flood v Irish Provident Assurance Co Ltd* [1912] 2 Ch 597n, Ir CA.

10 *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch 67.

11 But in such a case the ground on which restitution is ordered would appear to be mistake rather than the fact that the contract is void. As to mistake see PARA 28 et seq ante. Cf Treitel *The Law of Contract* (12th Edn, 2007) PARAS 19-123-19-125.

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### 106. No right of recovery.

Although the law may start 'with the assumption that money paid under a void contract can be recovered back'<sup>1</sup>, not every void contract gives rise to a right to recover money paid under the contract. The right to recover may be 'displaced by the policy underlying the rule of law which makes the contract void'<sup>2</sup>. Where the contract is rendered void by statute it is a matter of statutory interpretation whether money paid thereunder is recoverable<sup>4</sup>. Similarly, where the money is paid under a contract which is illegal and void the general rule is that the claimant is not entitled to recover the money paid under the illegal contract<sup>5</sup>.

1 Treitel *The Law of Contract* (12th Edn, 2007) PARA 22-013. See *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch 67; *Bell v Lever Bros Ltd* [1932] AC 161, HL; *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552, [1968] 3 All ER 104, HL. Cf *National & Provincial Building Society v Ahmed* [1995] 2 EGLR 127 at 130, CA, per Millett LJ; and see Birks (1993) 23 Univ of Western Australia Law Rev 195.

2 Treitel *The Law of Contract* (12th Edn, 2007) PARA 22-018. Eg money paid under a wagering contract which was declared to be void by the Gaming Act 1845 was not recoverable: *Morgan v Ashcroft* [1938] 1 KB 49, [1937] 3 All ER 92, CA; *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 561, [1992] 4 All ER 512 at 518, HL. See further LICENSING AND GAMBLING vol 67 (2008) PARA 327. For the position of a stakeholder holding a deposit on a bet see LICENSING AND GAMBLING vol 67 (2008) PARA 324. Where the contract is both ultra vires and a wager it is uncertain whether or not there is a right of recovery: *Morgan Grenfell & Co Ltd v Welwyn Hatfield District Council* [1995] 1 All ER 1 at 15. The Gaming Act 1845 was repealed by the Gambling Act 2005 s 356(3) (d), (4), Sch 17 as from 1 September 2007 and, from that date, it is an offence to cheat at gambling under the Gambling Act 2005 s 42.

4 See CONTRACT vol 9(1) (Reissue) PARA 887.

5 See eg *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1; and PARA 174 et seq post. See further the example of minors' contracts (see PARA 180 et seq post).

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### 107. Money paid under unenforceable contracts.

Where the contract between the parties is unenforceable<sup>1</sup> rather than void, the unenforceability of the contract does not of itself give rise to a right to recover money paid under the contract<sup>2</sup>. However, the claimant may be entitled to recover money paid on the ground that it was paid for a consideration which totally failed unless such a claim would undermine the rule which rendered the contract unenforceable<sup>3</sup>. Where the contract is unenforceable but the defendant remains ready, able or willing to perform his obligations under the contract, the claimant will not, as a general rule, be entitled to recover money paid to the defendant<sup>4</sup>.

1 Eg a contract which does not comply with the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 145; SALE OF LAND vol 42 (Reissue) PARA 29. See also CONTRACT vol 9(1) (Reissue) PARAS 607, 623.

2 *Orakpo v Manson Investments Ltd* [1978] AC 95, [1977] 3 All ER 1, HL.

3 *Orakpo v Manson Investments Ltd* [1978] AC 95, [1977] 3 All ER 1, HL. See also Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 74-81.

4 *Monnickendam v Leanse* (1923) 39 TLR 445.

## UPDATE

### 107 Money paid under unenforceable contracts

NOTE 1--While *Yaxley v Gotts* [2000] Ch 162, [2000] 1 All ER 711, CA, held that the doctrine of proprietary estoppel may be used to give effect to a contract which does not comply with the Law of Property (Miscellaneous Provisions) Act 1989 s 2, this proposition has been doubted in *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 4 All ER 713; see further SALE OF LAND vol 42 (Reissue) PARA 29.

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## (5) CLAIM BY THE PARTY IN BREACH TO RECOVER MONEY PAID

### 108. Introduction.

A party who commits a breach of contract may be able to bring a restitutionary claim against the innocent party to recover payments made to the innocent party prior to the termination of the contract<sup>1</sup>. The right to recover will only arise where the contract has been discharged as a result of the innocent party electing to terminate the contract<sup>2</sup>. When seeking to ascertain the rights of the party in breach to recover money paid, the courts have drawn a distinction between deposits and part payments<sup>3</sup>. The distinction between the two is a matter of construction<sup>4</sup> which in large part turns on the purpose for which the payment was made<sup>5</sup>. Where the language used in the contract is neutral, then a payment will generally be interpreted as a part payment so that it is, in principle, recoverable<sup>6</sup>.

1 See eg *Dies v British and International Mining and Finance Corp'n Ltd* [1939] 1 KB 724 (purchaser of goods who repudiated contract held entitled to recover substantial prepayment). See also *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 39 ALR 381, Aust HC; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA.

2 As to discharge of the contract see PARA 89 ante.

3 *Howe v Smith* (1884) 27 ChD 89, CA; *Dies v British and International Mining and Finance Corpn Ltd* [1939] 1 KB 724; *Clowes Development (UK) Ltd v Mulchinock* (24 May 2001) Lexis, Ch.

4 *Howe v Smith* (1884) 27 ChD 89 at 97-98, CA; *Harrison v Holland* [1922] 1 KB 211, CA; *Dies v British and International Mining and Finance Corpn Ltd* [1939] 1 KB 724; cf *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 at 94, PC.

5 In this sense the principle involved is analogous, if not identical, to the (total) failure of consideration cases, albeit that total failure of consideration was rejected as the ground for restitution by Stable J in *Dies v British and International Mining and Finance Corpn Ltd* [1939] 1 KB 724 at 744; cf *Baltic Shipping Co v Dillon, The Mikhail Lermontov* (1993) 176 CLR 344 at 352, Aust HC.

6 *Dies v British and International Mining and Finance Corpn Ltd* [1939] 1 KB 724 at 743 per Stable J.

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### 109. Deposits.

Where the money is paid by way of deposit<sup>1</sup>, it will generally not be recoverable by the party in breach<sup>2</sup>. A deposit is generally paid as a security for performance and so is liable to be forfeited if the depositor in breach of contract fails to perform his side of the bargain<sup>3</sup>. A deposit which is due is forfeitable even in the case where it has not been paid<sup>4</sup>. However, the court has a statutory discretion to order the return of a deposit paid in relation to a contract for the disposition of an interest in land where the action is for specific performance or for the return of a deposit<sup>5</sup>. A deposit may also be recoverable in equity where the forfeiture is held to be penal and it is unconscionable for the innocent party to retain the sum paid by way of deposit<sup>6</sup>. Similarly, a court may order the recipient of a deposit to return it to the payor where the deposit paid is held to have been unreasonable<sup>7</sup>.

1 A deposit paid under a contract of sale serves two purposes: if the sale is completed it counts as part payment of the purchase money; but it is primarily a security for performance of the contract: see *Depree v Bedborough* (1863) 4 Giff 479; and SALE OF LAND vol 42 (Reissue) PARA 234.

2 The position is otherwise if the depositor is not in breach of contract but has validly terminated the contract between the parties; in such a case the deposit will in principle be recoverable: *Greville v Da Costa* (1797) Peake Add Cas 113 (vendor unable to complete); *Wilde v Fort* (1812) 4 Taunt 334 (vendor failing to show good title); *Lloyd v Crispe* (1813) 5 Taunt 249 (vendor of lease failing to obtain consent to assignment); *Wright v Newton* (1835) 2 Cr M & R 124 (sale of public house and fixtures subject to landlords' consent, which was refused); *Gosbell v Archer* (1835) 2 Ad & El 500 at 508. Similarly, where the deposit is paid prior to the formation of any contract between the parties then in principle the deposit is recoverable even in the case where it is the depositor himself who is responsible for the failure of the parties to conclude a binding contract: *Chillingworth v Esche* [1924] 1 Ch 97, CA. However, where, as in *Sorrell v Finch* [1977] AC 728, [1976] 2 All ER 371, HL, prospective house purchasers paid a pre-contractual deposit to the vendor's estate agent, they were not able to recover it because the estate agent had been acting outside the vendor's authority in demanding the deposit.

3 *Howe v Smith* (1884) 27 ChD 89, CA; *Soper v Arnold* (1889) 14 App Cas 429, HL.

4 *Hinton v Sparkes* (1868) LR 3 CP 161; *Dewar v Mintoft* [1912] 2 KB 373.

5 See the Law of Property Act 1925 s 49(2), (3); and SALE OF LAND vol 42 (Reissue) PARA 246. The principle was applied in *Universal Corpn v Five Ways Properties Ltd* [1979] 1 All ER 552, 38 P & CR 687, CA. See also *Schindler v Pigault* (1975) 30 P & CR 328; cf *James Macara Ltd v Barclays Bank Ltd* [1945] KB 148, [1944] 2 All ER 589, CA. As to the forfeiture and recovery of deposits in the case of sale of land see further SALE OF LAND vol 42 (Reissue) PARA 234 et seq. Additionally, in the case of a contract which falls within the scope of the Unfair

Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended), a deposit may constitute an unreasonable term under Sch 2 para 1(d) and be unenforceable against the consumer: see CONTRACT vol 9(1) (Reissue) PARA 794. As to specific performance generally see SPECIFIC PERFORMANCE.

6 The scope of the equitable jurisdiction to grant relief is uncertain. In the case of a contract for the sale of goods, a contract for the sale of land or a contract to hire goods in return for rent, where the price is payable in instalments and the contract provides that a failure to pay one instalment on time will result in the forfeiture of instalments already paid, equity may grant the purchaser relief either in the form of giving him more time in which to pay the outstanding instalment or instalments (*Re Dagenham (Thames) Dock Co, ex p Hulse* (1873) 8 Ch App 1022; *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 at 521, [1997] 2 All ER 215 at 220, PC) or in the form of an order that the instalments already paid be repaid to the purchaser (*Steedman v Drinkle* [1916] 1 AC 275, PC; *Mussen v Van Diemen's Land Co* [1938] Ch 253, [1938] 1 All ER 210). It may be that the equitable jurisdiction can only be invoked by a claimant who remains able and willing to perform his obligations under the contract: *Mussen v Van Diemen's Land Co* supra. There may be a wider equitable jurisdiction to grant relief where it is unconscionable for the recipient to retain the deposit which has been paid: *Stockloser v Johnson* [1954] 1 QB 476 at 483, [1954] 1 All ER 630 at 633, CA, per Somervell LJ, and at 489-490 and 637-638 per Denning LJ. But the standing of this aspect of *Stockloser v Johnson* supra is uncertain. The dissenting judgment of Romer LJ (at 501 and 644) has found support in later cases (notably *Galbraith v Mitchenall Estates Ltd* [1965] 2 QB 473, [1964] 2 All ER 653) and the existence and scope of the jurisdiction to order repayment of sums paid was expressly left open in *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 581-582, [1993] 2 All ER 370 at 375-376, PC. Judicial opinion has varied: in some cases the emphasis has been placed on the need to promote certainty and, in consequence, the equitable jurisdiction to grant relief has been expressed in narrow terms (see eg *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 AC 694, [1983] 2 All ER 763, HL) but in other cases the emphasis has been placed on the need to do justice on the facts of the case and hence the equitable jurisdiction has been described in more expansive terms (see eg *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 1 All ER 90, HL). The most recent trend in judicial opinion is in the direction of certainty (*Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, [1997] 2 All ER 215, PC) but crucially in this context Lord Hoffmann left open (at 523 and 222) the possibility that the 'law of restitution and estoppel' might develop in such a way as to prevent the unjust enrichment of the recipient or the vendor. The courts in Australia have shown a greater willingness to develop equitable remedies in this context (see *Stern v McArthur* (1988) 165 CLR 489, 81 ALR 463) but the English courts are likely to be very hesitant about following the Australian courts (*Union Eagle Ltd v Golden Achievement Ltd* supra).

7 *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573, [1993] 2 All ER 370, PC. The Privy Council also held that the courts will not reduce an unreasonable deposit to reasonable proportions. To do so would be to re-write the terms of the bargain. Where the deposit is held to be unreasonable the recipient must return the deposit to the payor and his remedy must lie in damages for the loss suffered as a result of the payor's breach of contract.

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### 110. Part payments.

Where the money has been paid prior to the discharge of the contract not as a deposit or earnest for performance but as a prepayment of the purchase price, the right of the party in breach to recover the sum so paid depends on the construction of the particular contract between the parties<sup>1</sup>. Where the contract is one of sale and no property in the goods has passed to the buyer<sup>2</sup>, the money will generally be recoverable by the purchaser either because the right of the vendor to retain the prepayment is conditional upon completion of the contract so that, when completion does not take place as a result of the discharge of the contract, the condition upon which the vendor retains the money fails with the result that the money is recoverable by the purchaser<sup>3</sup> or on the ground that the consideration for the payment has wholly failed<sup>4</sup>. Where the contract is one for work and materials, the prepayment is less likely to be recoverable<sup>5</sup>. This is particularly so where the recipient of the money incurs expenditure in the performance of the contract: the prepayment in such a case is unlikely to be recoverable either because it is an unconditional payment<sup>6</sup> or on the ground that the failure of consideration in such a case is not total<sup>7</sup>.

1 *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 574, HL.

2 Where the seller has performed some part of his obligations under the contract the buyer will not generally be able to bring a restitutionary claim against the seller because in such a case there has been no total failure of consideration: cf para 98 ante.

3 *Dies v British and International Mining and Finance Corpn Ltd* [1939] 1 KB 724 (purchaser of goods who repudiated contract held entitled to recover substantial prepayment); *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA. The same principle applies to sales of land: see *Cornwall v Henson* [1900] 2 Ch 298 at 302, 305, CA; *Mayson v Clouet* [1924] AC 980, PC; *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 39 ALR 381, Aust HC; and SALE OF LAND vol 42 (Reissue) PARA 234. The vendor may of course have a defence, such as change of position, to the purchaser's claim. As to defences see PARA 165 et seq post.

4 Failure of consideration was rejected as the ground for restitution in *Dies v British and International Mining and Finance Corpn Ltd* [1939] 1 KB 724, but this case was decided prior to the decision of the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL, which finally clarified the true nature of the claim to recover upon a total failure of consideration (see PARA 88 ante). Today the court is more likely to employ failure of consideration reasoning: see eg *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA.

5 Examples can, however, be found of recovery outside contracts for the sale of goods or land: see eg *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA.

6 *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29 at 44-45, [1980] 1 WLR 1129 at 1148-1149, HL, per Lord Fraser of Tulleybelton. See also *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournarnas* [1978] 2 Lloyd's Rep 502, CA; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 574, HL.

7 *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29 at 35, [1980] 1 WLR 1129 at 1136, HL, per Viscount Dilhorne; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883 at 895-898, [1998] 1 WLR 574 at 587-590, HL, per Lord Goff of Chieveley, and at 906-908 and 598-600 per Lord Lloyd of Berwick. The total failure of consideration analysis was also employed in *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA; *Baltic Shipping Co v Dillon*, *The Mikhail Lermontov* (1993) 176 CLR 344 at 352, Aust HC, per Mason CJ.

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## **(6) PROPRIETARY CLAIMS**

### **111. Proprietary claims.**

The claim to recover money paid on a total failure of consideration is a personal restitutionary claim and does not generate a proprietary claim to recover the money so paid<sup>1</sup>. Similarly, in so far as a claim to recover money paid for 'no consideration' or an 'absence of consideration' is one recognised by law<sup>2</sup>, it does not give rise to a proprietary claim<sup>3</sup>.

1 *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, [1994] 2 All ER 806, PC. However, to the extent that cases decided under the line of authority represented by *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL, can be characterised as restitutionary in nature based on the failure of consideration for the payment, the proposition that the claim to recover upon a total failure of consideration does not give rise to a proprietary claim stands in need of qualification (see further Chambers *Resulting Trusts* (1997) Chs 3, 4). It is a separate question whether or not the courts would ever impose a constructive trust upon the recipient of money paid for a consideration which had wholly failed: see TRUSTS vol 48 (2007 Reissue) PARA 687 et seq.

2 See PARA 104 ante.

3 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL, overruling in this respect the decision in *Sinclair v Brougham* [1914] AC 398, HL. Where the contract between the parties was void but the claimant mistakenly believed that it was valid, it may be possible for the claimant to bring a proprietary claim based on the fact that the money was paid under mistake: see PARA 39 ante.

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## **(7) DEFENCES**

### **112. Defences.**

The claim to recover money paid on a total failure of consideration may be met by any of the standard defences to a personal restitutionary claim<sup>1</sup>. The defence which is most commonly invoked is that it is no longer possible to restore the parties to their previous position: that is to say, restitutio in integrum is no longer possible<sup>2</sup>. A claimant cannot both get back what he has parted with and keep what he has received in return. At common law the courts adopted a strict approach and insisted that the claimant must be able to make precise restitution to the defendant<sup>3</sup>, but the courts in equity have adopted a more flexible approach<sup>4</sup>. This more flexible approach assumes considerable significance in cases where the claimant is held to be entitled to recover money paid upon a partial failure of consideration<sup>5</sup>. In most, if not all, cases it should be possible for the court to value the benefit which the claimant has obtained at the expense of the defendant<sup>6</sup> so that, provided that the claimant is prepared to give credit to the defendant for the value of the benefit so obtained, he should in principle be entitled to recover the money which he has paid to the defendant<sup>7</sup>.

1 As to defences see PARA 165 et seq post.

2 See PARA 173 post.

3 See eg *Hunt v Silk* (1804) 5 East 449.

4 See eg *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL; *Hulton v Hulton* [1917] 1 KB 813, CA; *Spence v Crawford* [1939] 3 All ER 271, HL; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 130 ALR 570, Aust HC.

5 See PARAS 94-97 ante.

6 See Burrows *The Law of Restitution* (2nd Edn, 2002).

7 *Goss v Chilcott* [1996] AC 788 at 798, [1997] 2 All ER 110 at 117, PC; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 375, Aust HC.

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## **7. QUANTUM MERUIT AND QUANTUM VALEBAT**

### **(1) INTRODUCTION**

#### **113. In general.**

Claims to recover the value of goods supplied or services provided are presently governed by different rules from those which apply to claims to recover money which has been paid to the defendant<sup>1</sup>. In particular, the claim to recover upon a total failure of consideration does not apply to claims in respect of goods or services<sup>2</sup>. Instead, in the case of goods and services the ground on which recovery is ordered is expressed at a higher level of abstraction in the form either of a quantum meruit or quantum valebat<sup>3</sup>. However, not every case in which the claimant is held to be entitled to recover upon a quantum meruit or a quantum valebat basis is restitutionary in nature; in some cases these words are used to denote the measure of recovery in a contractual claim<sup>4</sup>. Quantum meruit or quantum valebat claims can arise in a number of different contexts: for example, upon the termination of a contract<sup>5</sup>, where the contract between the parties is void<sup>6</sup> and where no contract ever materialises between the parties<sup>7</sup>.

1 It can be argued that the grounds of restitution ought to be the same in money and non-money claims. The difference between a money claim and a non-money claim is obviously of significance in determining whether or not the defendant has been enriched (see PARA 11 et seq ante) but its relevance to the ground on which restitution is ordered is far from clear: see Burrows 'Free Acceptance and the Law of Restitution' (1988) 104 LQR 576. See also Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 508.

2 For a rare example of a case in which the language of total failure of consideration has been employed in a case to recover the value of goods supplied see *Pearce v Brain* [1929] 2 KB 310 at 312.

3 This division between money and non-money claims is not always rigorously pursued. Eg in the context of claims to recover on the ground of mistake it is not unusual to find the money claims and the non-money claims being grouped together, although even in the context of mistake the streams of authority have developed differently in that it is clear that the liability mistake rule has never applied to claims to recover the value of services rendered under a mistake (see PARAS 33, 40-42 ante).

4 In this title the focus is solely upon those quantum meruit and quantum valebat claims which are restitutionary in nature: see PARA 114 et seq post. See further PARA 8 ante. For a discussion of the heads of quantum meruit claims see *Primlake Ltd (in liquidation) v Matthews Associates* [2006] EWHC 1227 (Ch) at [343], [2007] 1 BCLC 666 at [343] per Lawrence Collins J.

5 See PARAS 114-120 post.

6 See PARAS 121-122 post.

7 See PARAS 123-126 post.

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## **(2) DISCHARGE FOR BREACH: THE CLAIM OF THE INNOCENT PARTY**

### **114. The right of election.**

A claimant who has performed services or supplied goods to the defendant prior to his decision to terminate the contract on the ground of the defendant's repudiatory breach of contract<sup>1</sup> may either bring a claim in contract against the defendant for the loss which he has suffered as a result of the defendant's breach of contract<sup>2</sup> or he may bring a restitutionary claim against the defendant to recover the value of any benefit which he has conferred upon the defendant prior to the termination of the contract<sup>3</sup>. The claimant cannot bring both claims; he must elect between them<sup>4</sup>. Thus where a publisher engaged an author to write a work but later in breach of contract abandoned the project, the author was entitled to recover reasonable remuneration for the work which he had done<sup>5</sup> without, apparently, tendering the completed work to the

defendant<sup>6</sup>; and where a defendant wrongfully revoked the claimant's authority to sell his land after the latter had found a purchaser, the claimant recovered reasonable remuneration for his work and labour up to that date<sup>7</sup>.

1 Although there is no English case precisely on point, it is generally accepted that the position is otherwise where the contract has been fully performed by the claimant. In such a case the claimant is confined to his claim on the contract and cannot recover a sum higher than the contract price by resort to a restitutionary claim. As to breach of contract see further CONTRACT vol 9(1) (Reissue) PARA 989 et seq.

2 See CONTRACT vol 9(1) (Reissue) PARA 1012; DAMAGES vol 12(1) (Reissue) PARA 941 et seq.

3 'Where one party has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract and sue on a quantum meruit basis for the work actually done': *De Bernardy v Harding* (1853) 8 Exch 822 at 824 per Alderson B. See also *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 140-141, [1941] 1 All ER 33 at 55, HL, per Lord Wright.

4 See PARA 91 note 2 ante.

5 *Planché v Colburn* (1831) 8 Bing 14. See also *De Bernardy v Harding* (1853) 8 Exch 822; *Lines v Rees* (1837) 1 Jur 593 (building contract); *Bush v Whitehaven Town and Harbour Trustees* (1888) 52 JP 392, CA; *Lodder v Slowey* [1904] AC 442, PC; *Chandler Bros Ltd v Boswell* [1936] 3 All ER 179, CA (similar cases); *Hill v Kitching* (1846) 3 CB 299 (principal and agent); *Lockwood v Levick* (1860) 8 CBNS 603; *Inchbald v Western Neilgherry Coffee, Tea and Cinchona Plantation Co Ltd* (1864) 17 CBNS 733 (similar cases); *O'Neil v Armstrong, Mitchell & Co* [1895] 2 QB 418, CA (master and servant); *Scott v Pattison* [1923] 2 KB 723 (similar case); *Lusty v Finsbury Securities Ltd* (1991) 58 BLR 66, CA (architect's appointment).

6 In such a case it may not be easy to ascertain the benefit which the defendant has received as a result of the claimant's performance: see PARA 115 post. For this reason it has been suggested that *Planché v Colburn* (1831) 8 Bing 14 is best regarded as a claim for reliance loss damages and not a restitutionary claim (see eg Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 515 note 10).

7 *Prickett v Badger* (1856) 1 CBNS 296. The position is different where there never was any contract: *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL. As to the formation of contracts for the sale of an interest in land see CONTRACT vol 9(1) (Reissue) PARA 637; SALE OF LAND vol 42 (Reissue) PARA 23 et seq. As to estate agents' contracts see AGENCY vol 1 (2008) PARA 103.

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## 115. Enrichment.

The claimant must prove that the defendant was enriched as a result of the work done in performance of the contract<sup>1</sup>. This can be done either by demonstrating that the defendant requested that the work be done<sup>2</sup> or that the defendant was incontrovertibly benefited as a result of the work done<sup>3</sup>. Where the claimant has performed only part of the work requested prior to the termination of the contract, the defendant will not generally be entitled to maintain that he was not enriched by the part performance given that it was his breach of contract which prevented the completion of the work<sup>4</sup>.

1 See PARA 11 et seq ante.

2 See PARA 14 ante.

3 See PARA 16 ante.

4 *Planché v Colburn* (1831) 8 Bing 14.

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### **116. The measure of recovery.**

While the claimant can elect to bring a restitutionary claim once the contract has been discharged, the measure of recovery is uncertain in that it is not clear whether or not the claimant can recover a sum in excess of the contract price. The balance of authority supports the view that the contract price does not act as a ceiling on the value of the restitutionary claim<sup>1</sup> but the point has never been authoritatively resolved by an English court<sup>2</sup>. Where the claimant must rely on the request of the defendant in order to establish that the defendant was enriched as a result of the work done by the claimant<sup>3</sup> then the terms of that request, and hence the contract price, should control the value of the restitutionary claim; but where the defendant is held to have been incontrovertibly benefited<sup>4</sup> then the value of that benefit should be the measure of recovery even if it is greater than the contract price<sup>5</sup>.

1 Cases which support the proposition that the contract price does not act as a ceiling include: *Boomer v Muir* 24 P 2d 570 (1933); *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234. For support for the proposition that the contract price does act as a ceiling see *Noyes v Pugin* 27 P 548 (1891); *Wuchter v Fitzgerald* 163 P 819 (1917). See generally Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 516-518.

2 In the first instance decision of *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm) at [25]-[26] Cooke J held obiter that notwithstanding *Boomer v Muir* 24 P 2d 570 (1933) (see note 1 supra) 'there can be no justification, even if a restitutionary claim is available, for recovery in excess of the contract limit. Such recovery in itself would be unjust since it would put the innocent party in a better position than he would have been if the contract had been fulfilled. In deciding any quantum meruit regard must be had to the contract as a guide to the value put upon the services and also to ensure justice between the parties'. However, the judge did not discuss the previous decisions to the contrary which suggest that the contract price does not act as a ceiling: see *Lodder v Slowey* [1904] AC 442, PC (affg *Slowey v Lodder* (1901) 20 NZLR 321 at 358, NZ CA, per Williams J); *Rover International Ltd v Cannon Film Sales (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA (although the contract in this case was void rather than terminated on the ground of the defendant's breach of contract). However, *Inchbald v Western Neilgherry Coffee, Tea and Cinchona Plantation Co Ltd* (1864) 17 CBNS 733 appears to lend support to the proposition that the contract price does act as a ceiling on the restitutionary claim. In the case of a contract which has been frustrated, the contract price is an important factor in the assessment of the 'just sum': see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 942, [1979] 1 WLR 783 at 805 per Robert Goff J; and PARA 101 ante.

3 See PARA 14 ante.

4 See PARA 16 ante.

5 See Burrows *The Law of Restitution* (2nd Edn, 2002) pp 344-347. On this view, the decision in *Boomer v Muir* 24 P 2d 570 (1933) should not be followed by an English court because the defendant was not incontrovertibly benefited and so the terms of the defendant's request should have acted as a ceiling on the claim brought by the claimants.

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### **(3) DISCHARGE FOR BREACH: THE POSITION OF THE PARTY IN BREACH**

#### **117. The entire contract rule.**

Where the claimant is the party in breach of contract and he has carried out work under the contract prior to its termination, his entitlement to recover payment in respect of the work done depends on whether or not he has fully performed the obligation in respect of which he seeks payment<sup>1</sup>. Where he has done so he will be entitled to claim payment for the work done; where he has not, he will generally be prevented from claiming payment for the work done by the operation of the 'entire contract'<sup>2</sup> or the 'entire obligation'<sup>3</sup> rule. Where the contract or obligation is 'entire' then a claim for payment cannot be brought for work done under the contract unless the claimant has fully or substantially<sup>4</sup> performed the obligation in respect of which payment is sought<sup>5</sup>. In contrast, where the contract is divisible or severable the claimant is entitled to recover payment for those obligations the performance of which he has completed, even though his failure to complete performance of the contract as a whole is a breach of contract<sup>6</sup>. Thus the obligation to pay for work done under a divisible part of a contract is independent of the performance of other parts of the contract<sup>7</sup>. It is a question of construction whether an obligation is entire or divisible<sup>8</sup>.

1 As to what constitutes performance of a contract see CONTRACT vol 9(1) (Reissue) PARA 921 et seq.

2 As to entire and divisible contracts see CONTRACT vol 9(1) (Reissue) PARA 922 et seq. 'Entire contract' is the usual terminology, although it has been criticised (see note 3 infra).

3 See Chitty On Contracts (29th Edn, 2004) PARA 21-028; Treitel *The Law of Contract* (12th Edn, 2007) PARAS 17-030-17-033.

4 As to substantial performance see *H Dakin & Co Ltd v Lee* [1916] 1 KB 566, CA; *Hoening v Isaacs* [1952] 2 All ER 176, [1952] 1 TLR 1360, CA; *Bolton v Mahadeva* [1972] 2 All ER 1322, [1972] 1 WLR 1009, CA; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 8-10, [1990] 1 All ER 512 at 516-517, CA, per Glidewell LJ, and at 17 and 552 per Russell LJ; and CONTRACT vol 9(1) (Reissue) PARA 924.

5 See *Cutter v Powell* (1795) 6 Term Rep 320; *Appleby v Myers* (1867) LR 2 CP 651 at 660, Ex Ch; *Sumpter v Hedges* [1898] 1 QB 673, CA; *Eshelby v Federated European Bank Ltd* [1932] 1 KB 423, CA; *Bolton v Mahadeva* [1972] 2 All ER 1322, [1972] 1 WLR 1009, CA; and CONTRACT vol 9(1) (Reissue) PARAS 922-924.

6 *Ritchie v Atkinson* (1808) 10 East 295.

7 See *Roberts v Havelock* (1832) 3 B & Ad 404; *Taylor v Laird* (1856) 1 H & N 266; and CONTRACT vol 9(1) (Reissue) PARA 922.

8 See *Appleby v Myers* (1867) LR 2 CP 651 at 658, Ex Ch; *Hoening v Isaacs* [1952] 2 All ER 176 at 178, [1952] 1 TLR 1360 at 1363 per Somervell LJ, and at 180 and 1367 per Denning LJ; *Regent OHG Aisenstadt und Barig v Francesco of Jermyn Street Ltd* [1981] 3 All ER 327 at 333-334; and CONTRACT vol 9(1) (Reissue) PARA 922.

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### **118. Partial performance is not an enrichment.**

The entire contract or the entire obligations rule<sup>1</sup> is not an absolute rule: it is subject to exceptions<sup>2</sup>, but in general these exceptions operate within narrow compass and claimants seeking payment for work done or goods supplied prior to the termination of the contract are unlikely to find much aid in the law of restitution. The courts have consistently rejected quantum meruit claims brought by the party in breach in respect of services rendered or goods supplied where the innocent party has terminated the contract before it has been substantially or wholly performed<sup>3</sup>. This is largely because the innocent party can maintain that he has not been enriched by the claimant's partial performance. The innocent party requested the

claimant to do all, not part, of the work and his request is generally not pro-ratable<sup>4</sup>. Nor can the innocent party be said to have freely accepted the part performance because it was accepted in the context of complete performance and so it cannot be said that the innocent party had an opportunity to reject the part performance<sup>5</sup>. Where, however, the innocent party does have a choice whether or not to accept the part performance, and he chooses to accept it, then he must pay for it<sup>6</sup>. Thus where a builder abandoned work under a building contract and left materials on the site, the claimant was held to be liable to pay for the value of the materials which he chose to use in the completion of the building<sup>7</sup>.

1 See PARA 117 ante.

2 One exception is the substantial performance rule: see PARA 117 note 4 ante. As to entire and divisible contracts see further CONTRACT vol 9(1) (Reissue) PARA 922 et seq.

3 *Munro v Butt* (1858) 8 E & B 738; *Hopper v Burness* (1876) 1 CPD 137; *Whitaker v Dunn* (1887) 3 TLR 602; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA; *Sumpter v Hedges* [1898] 1 QB 673, CA; *Wheeler v Stratton* (1911) 105 LT 786, DC; *Bolton v Mahadeva* [1972] 2 All ER 1322, [1972] 1 WLR 1009, CA.

4 *Sumpter v Hedges* [1898] 1 QB 673, CA. Cf Burrows *The Law of Restitution* (2nd Edn, 2002) pp 354-359.

5 See PARA 15 ante.

6 This is either because his acceptance creates a contract between the parties in respect of the part performance or because an obligation to pay for the work which has been accepted is imposed by the law of restitution: see *Munro v Butt* (1858) 8 E & B 738; *Sumpter v Hedges* [1898] 1 QB 673 at 676, CA, per Collins LJ; *Forman & Co Proprietary Ltd v Liddesdale* [1900] AC 190, PC.

7 *Sumpter v Hedges* [1898] 1 QB 673, CA. The position is otherwise in relation to the partially completed building. The mere fact that the defendant completes the building does not create a restitutionary obligation to pay for the value of the work done because the defendant has no choice but to accept the partially completed building: cf Burrows *The Law of Restitution* (2nd Edn, 2002) pp 354-359.

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### 119. Cases where recovery is permitted.

In addition to the case where the innocent party chooses to accept the partial performance of the contract as a benefit<sup>1</sup> there are other examples of cases in which the party in breach has been held entitled to bring a quantum meruit claim for work done prior to the termination of the contract. Thus a shipowner who deviates but who nevertheless delivers the goods to the cargo owner at the port of discharge named in the contract has been held to be entitled to recover upon a quantum meruit basis for the reasonable value of the services which he has provided<sup>2</sup>. Similarly, a shipowner has been held to be entitled to recover freight for completed voyages notwithstanding the fact that some of the goods were damaged as a result of the shipowner's breach of contract<sup>3</sup>.

Statute has also intervened to turn what would otherwise constitute partial performance into performance which gives rise to a claim for payment. For example, it is provided that certain rents and annuities are deemed to accrue from day to day and are apportionable in respect of time<sup>4</sup>. It is also provided that where a seller of goods delivers to the buyer less than the quantity stipulated in the contract and the buyer chooses to accept the goods delivered, the buyer must pay for the goods at the contract rate<sup>5</sup>.

1 See PARA 118 text and notes 6-7 ante. As to what constitutes performance of a contract see CONTRACT vol 9(1) (Reissue) PARA 921 et seq. As to acceptance of partial performance see CONTRACT vol 9(1) (Reissue) PARA 923.

2 See *Hain Steamship Co Ltd v Tate & Lyle Ltd* [1936] 2 All ER 597 at 604, 41 Com Cas 350 at 358, HL, per Lord Atkin, at 612 and 368 per Lord Wright MR, and at 616 and 373 per Lord Maugham; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 81. While the shipowner may be entitled to recover upon a quantum meruit basis rather than under the terms of the contract, it is unlikely that the quantum meruit will be allowed to exceed the agreed freight: see Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 550-552.

3 In such a case it can be said that the shipowner has substantially performed his obligations under the contract: see eg *Dakin v Oxley* (1864) 15 CBNS 646; *William Thomas & Sons v Harrowing Steamship Co* [1915] AC 58, HL; *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233, [1973] 3 All ER 589, CA.

4 All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) are, like interest on money lent, to be considered as accruing from day to day, and are apportionable in respect of time accordingly: see the Apportionment Act 1870 s 2 (amended by the Statute Law Revision (No 2) Act 1893); and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 839 et seq. The word 'annuities' is deemed to include salaries and pensions and it has been held that the Apportionment Act 1870 can be applied to a claim for wages brought by an employee who has been dismissed: *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91. See also *Moriarty v Regent's Garage Co* [1921] 1 KB 423 at 435 per Lush J (cf at 449 per McCardie J); *Re William Porter & Co Ltd* [1937] 2 All ER 361 at 363 per Simonds J.

5 Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate: see the Sale of Goods Act 1979 s 30(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 172.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/7. QUANTUM MERUIT AND QUANTUM VALEBAT/(3) DISCHARGE FOR BREACH: THE POSITION OF THE PARTY IN BREACH/120. Contract has not been discharged.

## **120. Contract has not been discharged.**

As a general rule the party in breach of contract cannot bring a restitutionary claim in respect of services provided or goods supplied unless and until the contract between the claimant and the defendant has been discharged<sup>1</sup>. Exceptionally, a claimant who is in breach of contract may be entitled to recover the reasonable value of work carried out under the contract notwithstanding the fact that the defendant has not terminated the contract on account of the claimant's breach<sup>2</sup>.

1 As to discharge of a contract see PARA 89 ante; and CONTRACT vol 9(1) (Reissue) PARA 920 et seq.

2 There are conflicting dicta on this point. In *Miles v Wakefield Metropolitan District Council* [1987] AC 539, [1987] 1 All ER 1089, HL, Lord Brightman (at 553 and 1092) and Lord Templeman (at 561 and 1099) were of the view that such a restitutionary claim can be brought; Lord Brandon of Oakbrook (at 552 and 1092) and Lord Oliver of Aylmerton (at 576 and 1110) left the point open; while Lord Bridge of Harwich (at 552 and 1092) had difficulty in seeing how such a claim could be sustained. See also *Wiluszynski v Tower Hamlets London Borough Council* [1989] ICR 493, [1989] IRLR 259, CA; *Steele v Tardiani* (1946) 72 CLR 386, Aust HC.

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## **(4) VOID AND UNENFORCEABLE CONTRACTS**

## 121. Void contracts.

Where the claimant performs work for the defendant or supplies goods to the defendant under a contract which is subsequently discovered to have been void, the claimant may be entitled to recover the value of the work so done either on the basis that the work was done under a mistake or on the ground that the fact that the contract was void of itself gives the claimant a right to recover the value of the work so done<sup>1</sup>. The defendant must have been enriched as a result of the work done or goods supplied<sup>2</sup>. Thus where a managing director of a company carried out work for the company and it was subsequently discovered that the contract under which he had performed the services was void, it was held that he was entitled to recover on a quantum meruit basis for the services rendered<sup>3</sup>. Similarly, a company which carried out work under a contract which was void because the company had not been incorporated at the time of entry into the contract was held to be entitled to recover upon a quantum meruit basis<sup>4</sup>; it was further held that the contract price did not act as a ceiling upon the restitutionary claim<sup>5</sup>.

1 *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066, CA. Cf *Re Richmond Gate Property Co Ltd* [1964] 3 All ER 936, [1965] 1 WLR 335; *Guinness plc v Saunders* [1990] 2 AC 663, [1990] 1 All ER 652, HL. As to void contracts see further CONTRACT vol 9(1) (Reissue) PARA 836 et seq.

2 As to the tests to be applied when seeking to ascertain whether or not the defendant has been enriched see PARA 11 et seq ante.

3 *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066, CA. There is some difficulty in the case in ascertaining the basis on which it can be said that the defendant company was enriched by the services supplied by the claimant. The fact that there was no one authorised to act on behalf of the defendant makes it difficult, if not impossible, to rely on request or free acceptance (see PARAS 14-15 ante) to establish the existence of an enrichment. The case is probably best explained as an example of incontrovertible benefit: see *Birks An Introduction to the Law of Restitution* (1985) pp 118-119.

4 *Rover International Ltd v Cannon Film Sales (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA. See also *Cotronic (UK) Ltd v Dezonie* [1991] BCLC 721, [1991] BCC 200, CA; and COMPANIES vol 14 (2009) PARA 279.

5 *Rover International Ltd v Cannon Film Sales (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA. See also PARA 116 text and notes 1-2 ante.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/7. QUANTUM MERUIT AND QUANTUM VALEBAT/(4) VOID AND UNENFORCEABLE CONTRACTS/122. Unenforceable contracts.

## 122. Unenforceable contracts.

Where the claimant performs work for the defendant or supplies the defendant with goods under a contract which is unenforceable, the claimant may be entitled to recover the reasonable value of the work so done or goods supplied<sup>1</sup> provided that the restitutionary claim does not undermine the purpose of the rule which rendered the contract unenforceable<sup>2</sup>. The defendant must have been enriched as a result of the work done or goods supplied<sup>3</sup>.

1 *Scarbrick v Parkinson* (1869) 20 LT 175 (contract of employment for more than one year; liability for services rendered); *Pulbrook v Lawes* (1876) 1 QBD 284 (agreement for lease; work done on premises by intended lessee; liability for improvements carried out); *Scott v Pattison* [1923] 2 KB 723 (contract of employment for more than one year; liability for wages in respect of illness of employee); *Degelman v Guaranty Trust Co of Canada and Constantineau* [1954] 3 DLR 785 (services rendered under contract unenforceable under Statute of Frauds; liability to pay for work done); *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, Aust HC (building work carried out under building contract which was not concluded in writing; liability to pay for work done). See also *Stoljar The Law of Quasi-Contract* (2nd Edn, 1989) pp 232-235; and *Mavor v Pyne* (1825) 2 C & P 91 (agreement to take work published periodically and refusal to complete; liability for numbers

delivered); *Savage v Canning* (1867) 16 WR 133 (contract to procure purchaser; liability for services rendered); *Knowlman v Bluett* (1874) LR 9 Exch 307 (agreement for maintenance of child for indefinite period; liability for arrears); *Sanderson v Graves* (1875) LR 10 Exch 234 at 238 per Bramwell B (oral agreement substituted for written agreement); cf *Howell v Evans* (1926) 134 LT 570 (refusal to pay for instalments until whole work published; held to be an instalment contract).

2 See eg *Dimond v Lovell* [2000] 2 All ER 897 at 906, HL. See also *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, Aust HC.

3 See PARA 11 et seq ante. In most cases the issue will turn on whether or not the defendant requested or bargained for the work which has been done by the claimant (see PARA 14 ante), but in other cases the issue might be whether or not the defendant was incontrovertibly benefited (see PARA 16 ante).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/7. QUANTUM MERUIT AND QUANTUM VALEBAT/(5) WORK DONE IN ANTICIPATION OF A CONTRACT/123. Introduction.

## **(5) WORK DONE IN ANTICIPATION OF A CONTRACT**

### **123. Introduction.**

Work is often commenced prior to the conclusion of a formal contract between the parties. Where a contract is subsequently drawn up, the rights and obligations of the parties will be governed by the terms of the contract<sup>1</sup>. Where no formal contract exists<sup>2</sup> the rights and obligations of the parties can only be ascertained by a careful examination of the facts and circumstances of the particular case in the light of the relevant legal principles. There are a number of possible solutions. In many cases the work will be done, expressly or impliedly, at the risk of the party performing the service. This is most often the case where he states that he provides 'free estimates' or 'free advice without commitment'. In such a case the party performing the work will have no claim whatsoever in the event of a contract failing to materialise.

1 See PARA 124 post. See further CONTRACT vol 9(1) (Reissue) PARA 767 et seq.

2 As to the essential requirements for the formation of a contract see CONTRACT vol 9(1) (Reissue) PARA 629 et seq.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/7. QUANTUM MERUIT AND QUANTUM VALEBAT/(5) WORK DONE IN ANTICIPATION OF A CONTRACT/124. The contractual solution.

### **124. The contractual solution.**

Where work has been done and it is necessary to ascertain the rights and obligations of the parties, the courts may, in some cases, be able to conclude that the parties have in fact concluded a contract, notwithstanding the absence of a formal contract between them<sup>1</sup>. Examples can be found of cases in which the courts have been willing to infer that there is, in fact, a contract between what would otherwise appear to be negotiating parties<sup>2</sup>. The failure of the parties to reach agreement on certain material terms may, however, preclude the existence of a contractual solution<sup>3</sup>.

1 See eg *Way v Latilla* [1937] 3 All ER 759, 81 Sol Jo 786, HL, which was decided at a time when the implied contract theory of restitution was prevalent (see PARA 1 et seq) and it may, therefore, be the case that it is an example of an independent restitutionary claim. It remains uncertain whether the claim is properly classified as a contractual claim or a restitutionary claim. See also *Turriff Construction Ltd v Regalia Knitting Mills Ltd* (1971) 9 BLR 20, 222 Estates Gazette 169; *ERDC Group Ltd v Brunel University* [2006] EWHC 687 (TCC), [2006] BLR 255. As to the essential requirements for the formation of a contract see CONTRACT vol 9(1) (Reissue) PARA 629 et seq.

2 See eg *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25, [1990] 1 WLR 1195, CA, where it was held that one negotiating party was contractually obliged to consider the tender which the other had submitted.

3 See eg *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, [1982] Com LR 54.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/7. QUANTUM MERUIT AND QUANTUM VALEBAT/(5) WORK DONE IN ANTICIPATION OF A CONTRACT/125. A restitutionary claim.

## 125. A restitutionary claim.

Where work has been done and it is necessary to ascertain the rights and obligations of the parties, the party who has done the work may be able to bring a restitutionary claim against the recipient. In order to do so, the claimant must show that the defendant was enriched as a result of the work which has been done<sup>1</sup>. Where the work which has been done by the claimant has resulted in an end product which has been received by the defendant then it is not difficult to establish the existence of an enrichment<sup>2</sup>. Where the work which has been done is defective, in the sense that it does not correspond with what has been requested by the defendant, then the value of the enrichment should be reduced to reflect the fact that what has been provided does not correspond with what was requested<sup>3</sup>. Where the work which has been done has not resulted in an identifiable end product in the hands of the defendant, it is much more difficult to establish the existence of an enrichment<sup>4</sup>. However, cases can be found in which a restitutionary claim has succeeded notwithstanding the fact that the work done appears to have been wasted<sup>5</sup>. In considering whether or not the claimant is entitled to recover upon a quantum meruit basis the courts will have regard to the responsibility for the failure to reach agreement. Where the claimant is held to be responsible for the parties' failure to reach agreement, the restitutionary claim is more likely to be denied<sup>6</sup>; conversely, where the defendant is responsible for the failure to reach agreement, the restitutionary claim is more likely to succeed<sup>7</sup>. No one factor appears to be decisive. Where the work is done on a 'subject to contract' basis, that will generally suffice to negate any restitutionary claim<sup>8</sup>. It has been suggested that the ground of restitution in these cases is mistake<sup>9</sup>. An alternative analysis is that the ground of restitution is in fact failure of consideration, namely the failure of the parties to conclude a contract<sup>10</sup>.

1 See PARA 11 et seq ante.

2 *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, [1982] Com LR 54 (manufacture of steelwork for building project).

3 See eg *Crown House Engineering Ltd v Amec Projects Ltd* (1990) 48 BLR 32 at 54, CA, per Slade LJ, and at 57 per Bingham LJ.

4 See eg *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428, [1953] 2 All ER 1330, CA; *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712, [1957] 1 WLR 932; *Marston Construction Co Ltd v Kigass Ltd* (1989) 46 BLR 109, 15 ConLR 116 (construction tender); *Vedatech Corpn v Crystal Decisions (UK) Ltd* [2002] EWHC 818 (Ch), [2002] All ER (D) 318 (May).

5 See eg *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712, [1957] 1 WLR 932 (builder requested to prepare revised estimates for rebuilding; when owner sold premises, builder held entitled to remuneration for work done at owner's request over and above actual tender).

6 See eg *Jennings and Chapman Ltd v Woodman, Matthews & Co* [1952] 2 TLR 409, 96 Sol Jo 648, CA; *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880.

7 See eg *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428, [1953] 2 All ER 1330, CA (prospective tenant who requested landlord to make alterations to premises to be leased was held liable for cost of alterations).

8 See eg *Regalian Properties plc v London Dockland Development Corp*n [1995] 1 All ER 1005, [1995] 1 WLR 212 (contractor cannot recover costs of preparation for contract where tender accepted subject to contract); *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] CLC 324.

9 *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712 at 719, [1957] 1 WLR 932 at 939 per Barry J. The analysis is open to attack on the ground that it fails to distinguish between a mistake and misprediction. The failure of a contract to materialise seems to be a misprediction and a misprediction does not generally generate a restitutionary claim. As to mistake see PARA 28 et seq ante; and MISTAKE.

10 See Burrows (1988) 104 LQR 576, 596. As to the meaning of 'failure of consideration' see PARA 88 ante. As to consideration in a contractual context see further CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/7. QUANTUM MERUIT AND QUANTUM VALEBAT/(5) WORK DONE IN ANTICIPATION OF A CONTRACT/126. Alternative grounds of liability.

## 126. Alternative grounds of liability.

A party may be held to be estopped by his conduct from denying the existence of a liability to pay for the work done where it would be unconscionable to withdraw from the negotiations without incurring any liability for doing so<sup>1</sup>.

1 See eg *A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114, [1987] 2 All ER 387, PC; *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan City Council* (1980) 41 P & CR 179; *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17, [2006] 4 LRC 658. The Australian courts have been prepared to make greater use of estoppel in this context: see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Aust HC. As to estoppel see generally ESTOPPEL.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/7. QUANTUM MERUIT AND QUANTUM VALEBAT/(6) FREE ACCEPTANCE OF GOODS OR SERVICES/127. Free acceptance.

## (6) FREE ACCEPTANCE OF GOODS OR SERVICES

### 127. Free acceptance.

A claimant who provides services or supplies goods to the defendant may be entitled to bring a restitutionary claim against the defendant where the defendant: (1) had an opportunity to reject the goods or services<sup>1</sup>; (2) did not take that opportunity<sup>2</sup>; and (3) was aware at the time at which the goods or services were supplied that they were being supplied by the claimant with a non-gratuitous intent<sup>3</sup>. This has been termed 'free acceptance'<sup>4</sup>. Where the defendant has requested the claimant to perform the services or supply the goods, that request will generally lead to the inference of a contract but the inference of a contract is not irresistible.

Where it is not possible to imply a contract between the parties, the claimant may be able to bring a restitutionary claim against the defendant for the reasonable value of the goods supplied or services rendered<sup>5</sup>. In addition to satisfying the three criteria set out above, the claimant must also show that the defendant has been enriched as a result of the work done or the goods supplied by the claimant<sup>6</sup>.

1 See Birks *An Introduction to the Law of Restitution* (1985) pp 280-281, citing *Leigh v Dickeson* (1884) 15 QBD 60 at 64-65, CA, per Brett MR and *Taylor v Laird* (1856) 25 LJ Ex 329 at 332. See also *Re Cleadon Trust Ltd* [1939] Ch 286, [1938] 4 All ER 518, CA.

2 See Birks *An Introduction to the Law of Restitution* (1985) pp 283-286, citing *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428, [1953] 2 All ER 1330, CA. It is necessary to show that the defendant did not avail himself of the opportunity to reject the services in order to rebut the inference which might otherwise arise that the claimant was a risk-taker.

3 See Birks *An Introduction to the Law of Restitution* (1985) pp 281-283, citing *Brown and Davis Ltd v Galbraith* [1972] 3 All ER 31, [1972] 1 WLR 997, CA (claimants held not to be entitled to recover from defendant in respect of repair work carried out to defendant's car when the defendant's insurance company failed; the defendant was justified in believing that the work was gratuitous as far as he was concerned); *Gilbert and Partners v Knight* [1968] 2 All ER 248, 112 Sol Jo 155, CA (claim by surveyors for reasonable value of extra work done rejected because the defendant reasonably believed that the work done was covered by the fee which the claimants had originally quoted); *R (on the application of Rowe) v Vale of White Horse District Council* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418 (a local authority which supplies services without informing consumers that it intends to charge for them does not have a right in restitution to claim payment because it is the author of its own misfortune, having created and perpetuated the belief that no payment is due).

4 See generally Birks 'In Defence of Free Acceptance' in Burrows (Ed) *Essays on the Law of Restitution* (1991) Ch 5. Cf Burrows (1988) 104 LQR 576; Burrows *The Law of Restitution* (2nd Edn, 2002) pp 402-407. The hold of 'free acceptance' in the cases is, however, very tenuous. While the cases cited are consistent with the constituent elements of free acceptance, the courts have not employed the language of free acceptance. To the extent that it exists, free acceptance is relevant both to the existence of an enrichment (see PARA 15 ante; and Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 20-24) and to the ground on which restitution is ordered.

5 Examples of cases in which it has been argued that the claimant recovered on the basis of 'free acceptance' include *Lamb v Buncie* (1815) 4 M & S 275 (doctor rendering services to pauper; parish, which knew that services were being rendered, held liable to pay); *Tomlinson v Bentall* (1826) 5 B & C 738 (similar case); *Weatherby v Banham* (1832) 5 C & P 228 (claimant held to be entitled to recover price of issues of publication sent to the defendant); *Paynter v Williams* (1833) 1 Cr & M 810 (apothecary rendering services to pauper held to be entitled to recover value of services after he had notified the parish of the fact that the services were being rendered); *Alexander v Vane* (1836) 1 M & W 511 (claimant offered to pay for goods ordered for defendant's business if defendant did not pay; claimant held to be entitled to recover from defendant when claimant was required by supplier to pay for goods ordered).

6 As to unjust enrichment see further PARA 11 et seq ante.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/7. QUANTUM MERUIT AND QUANTUM VALEBAT/(7) DEFENCES/128. Defences.

## **(7) DEFENCES**

### **128. Defences.**

The claim to recover the reasonable value of services rendered or goods supplied may be met by any of the standard defences which exist to a restitutionary claim<sup>1</sup>. A claimant who has acted voluntarily in rendering the services or supplying the goods may be held not to have a restitutionary claim against the defendant<sup>2</sup>. The word 'voluntarily' seems to be used in a number of different senses. Where the claimant has acted 'voluntarily' in the sense that he has rendered services or supplied goods to a defendant who has not requested them, the reason

for the failure of the claim may be found in the fact that the defendant was not enriched<sup>3</sup>. A claimant may also be said to have acted 'voluntarily' where he has taken the risk, or is held to have assumed the risk, that the defendant will not pay for the services rendered or goods supplied<sup>4</sup>.

1 See PARA 165 et seq post.

2 See eg *Re Rhodes* (1890) 44 ChD 94, CA; *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA; *R (on the application of Rowe) v Vale of White Horse District Council* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418.

3 Ie unless it can be said that the defendant has been incontrovertibly benefited by the intervention of the claimant: see PARA 16 ante.

4 This issue is vital in most of the 'free acceptance' cases (see PARA 127 ante), where the issue is, essentially, whether the claimant is a risk-taker who should be denied a claim for the work done or goods supplied or whether the defendant should be liable to pay for the benefit which he has obtained. It is sometimes said that a claimant who is a risk-taker is 'officious' and, for this reason, is not entitled to recover. However, the meaning to be ascribed to the word 'officious' is not always clear: see Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 70-72; Virgo *The Principles of the Law of Restitution* (2nd Edn, 2006) pp 283-285.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/7. QUANTUM MERUIT AND QUANTUM VALEBAT/(8) PROPRIETARY CLAIMS/129. Proprietary claims.

## **(8) PROPRIETARY CLAIMS**

### **129. Proprietary claims.**

The claim to recover the reasonable value of services rendered or goods supplied is a personal and not a proprietary claim<sup>1</sup>.

1 The position might be otherwise where the claimant can establish another ground of restitution, such as mistake, which can give rise to a proprietary claim. Similarly, where the services are rendered in an emergency the claimant may be entitled to a lien over the goods, at least where the salvage rules are applicable (see PARA 134 post). See further LIEN vol 68 (2008) PARA 870 et seq.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/8. NECESSITY/130. General rule of no recovery.

## **8. NECESSITY**

### **130. General rule of no recovery.**

A claimant who intervenes in a situation of necessity to save the person or property of the defendant does not, by virtue of the fact of his intervention, have a claim against the defendant for the value of the services which he has conferred<sup>1</sup> or for the extent of the benefit received by the defendant as a result of the claimant's intervention<sup>2</sup>. In this respect English law does not recognise the existence of a general negotiorum gestio action<sup>3</sup>. However, there are a number of exceptional cases where the law does allow a claimant to recover the value of services rendered or money paid in a situation of necessity or emergency<sup>4</sup>.

1 A claim for the value of the services rendered does not necessarily coincide with the benefit which the defendant has obtained. Eg where the claimant's intervention has been unsuccessful, it can be said that the defendant has not been benefited as a result of the claimant's intervention, but the defendant may nevertheless have to pay the claimant the reasonable value of the services which he has provided: see eg *Matheson v Smiley* [1932] 2 DLR 787.

2 See eg *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234 at 248-249, CA, per Bowen LJ; *Nicholson v Chapman* (1793) 2 Hy Bl 254.

3 In this respect English law is unlike most civil law systems, which do recognise such a claim.

4 See PARA 131 et seq post.

## UPDATE

### 130 General rule of no recovery

NOTE 3--See Case C-47/07P *Masdar (UK) Ltd v EC Commission* [2009] 2 CMLR 1, [2008] All ER (D) 166 (Dec), ECJ (continued provision of services, in belief that EC Commission had undertaken that provider would be paid for them, could not be claimed to be benevolent intervention).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/8. NECESSITY/131. Agency of necessity.

### 131. Agency of necessity.

Where there is a pre-existing relationship between the parties<sup>1</sup> (usually, but not necessarily a contractual relationship<sup>2</sup>) and the claimant (the agent), when faced by an emergency situation, acts in excess of his actual authority on behalf of the defendant (the principal), he may be able to bring a claim against the defendant. In order to do so the claimant must satisfy a number of requirements. The first is that the claimant must have been unable to obtain the instructions of the defendant at the relevant time<sup>3</sup> or it must have been impracticable<sup>4</sup> to obtain instructions. The test is satisfied where the claimant seeks instructions from the defendant but the defendant does not respond sufficiently quickly<sup>5</sup>. Secondly, the claimant must have encountered a situation of necessity<sup>6</sup>. The necessity need not be physical but can be commercial (for example, the need to sell goods which are deteriorating)<sup>7</sup>. Usually the necessity will take the form of some kind of emergency which demands that the claimant take a particular course of action<sup>8</sup>, but it need not do so<sup>9</sup>. The fact that it is no longer convenient for the defendant to continue to store the goods does not establish necessity, at least where the goods are not perishable in nature or not otherwise in danger<sup>10</sup>. Thirdly, the claimant must have acted bona fide in the interests of the defendant<sup>11</sup>. Finally, the action taken by the claimant must have been reasonable and prudent in all the circumstances of the case<sup>12</sup>. This doctrine is no longer<sup>13</sup> confined to carriage of goods by sea and can extend, in an appropriate case, to the carriage of goods by land<sup>14</sup> or to the storage of goods on land<sup>15</sup>.

1 *Jebara v Ottoman Bank* [1927] 2 KB 254 at 271, CA, per Scrutton LJ; *China-Pacific Food SA v Food Corp'n of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL; *Re F (mental patient: sterilisation)* [1990] 2 AC 1 at 74, sub nom *F v West Berkshire Health Authority* [1989] 2 All ER 545 at 565, HL, per Lord Goff of Chieveley.

2 The parties may, for example, be bailor and bailee and the bailment may be gratuitous in nature: see eg *Sachs v Miklos* [1948] 2 KB 23, [1948] 1 All ER 67, CA; *Munro v Willmott* [1949] 1 KB 295, [1948] 2 All ER 983. As to the relationship between bailor and bailee see further BAILMENT.

3 *Sims & Co v Midland Rly Co* [1913] 1 KB 103 at 107; *Springer v Great Western Rly Co* [1921] 1 KB 257, CA.

4 In other words it need not have been physically impossible to communicate with the defendant. It suffices that it was practically impossible to do so: *Sims & Co v Midland Rly* [1913] 1 KB 103 at 112 per Scrutton J. Of course, with modern methods of communication it is becoming increasingly difficult to be out of contact of others and, for this reason, the practical significance of the doctrine of agency of necessity is much reduced.

5 *China-Pacific SA v Food Corpn of India, The Winson* [1982] AC 939 at 961, [1981] 3 All ER 688 at 695, HL, per Lord Diplock.

6 It suffices that the reasonable man would think that there is a situation of necessity: *Tetley & Co v British Trade Corpn* (1922) 10 Ll L Rep 678. See also *Guildford Borough Council v Hein* [2005] EWCA Civ 979 at [33], [2005] LGR 797 at [33] per Clarke LJ, and at [80] per Waller LJ (dogs removed from owner cared for by council as a matter of necessity; council entitled to reasonable expenses).

7 See eg *Sims & Co v Midland Rly Co* [1913] 1 KB 103.

8 'The word 'necessity', when applied to mercantile affairs, where the judgment must, in the nature of things, be exercised, cannot of course mean an irresistible compelling power--what is meant by it in such cases is, the force of circumstances which determines the course a man ought to take': *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222 at 230 per Sir Montagu Smith.

9 *Re F (mental patient: sterilisation)* [1990] 2 AC 1 at 75, sub nom *F v West Berkshire Health Authority* [1989] 2 All ER 545 at 565, HL, per Lord Goff of Chieveley.

10 *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566; *Sachs v Miklos* [1948] 2 KB 23, [1948] 1 All ER 67, CA; *Munro v Willmott* [1949] 1 KB 295, [1948] 2 All ER 983. Where the goods have not been collected for a substantial period of time the person to whom the goods have been entrusted may be able to sell or dispose of the goods under the Torts (Interference with Goods) Act 1977 ss 12, 13 (as amended), Sch 1: see TORT vol 45(2) (Reissue) PARA 647.

11 *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566 at 572.

12 *Broom v Hall* (1859) 7 CBNS 503; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222 at 230; *Phelps, James & Co v Hill* [1891] 1 QB 605, CA.

13 Early cases did attempt to confine the jurisdiction to the carriage of goods by sea: *Hawtayne v Bourne* (1841) 7 M & W 595 at 599; *Gwilliam v Twist* [1895] 2 QB 84 at 87, CA.

14 *Great Northern Rly Co v Swaffield* (1874) LR 9 Exch 132. Quaere, however, whether *Great Northern Rly Co v Swaffield* supra is in fact an agency of necessity case (see PARA 135 note 4 post).

15 *Sachs v Miklos* [1948] 2 KB 23, [1948] 1 All ER 67, CA; *Munro v Willmott* [1949] 1 KB 295, [1948] 2 All ER 983.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/8. NECESSITY/132. No pre-existing relationship.

### 132. No pre-existing relationship.

Where there is no pre-existing legal relationship between the parties, it is much more difficult for the claimant who intervenes in a situation of necessity to recover from the defendant expenses incurred or the reasonable value of the services rendered or of the goods supplied<sup>1</sup>. It is not, however, impossible. There are cases and dicta which support the existence of a right of recovery<sup>2</sup>. However, these exceptions appear to lack a coherent rationale; in some cases the status of the dicta as a matter of authority is uncertain and the scope of the exceptions so recognised remains a matter of doubt<sup>3</sup>.

1 See eg *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234, CA.

2 The same point can be made in relation to dicta which are hostile to the existence of a restitutionary claim (see particularly *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234, CA, where the broadly phrased

dicta are obiter and therefore do not present an insuperable obstacle to the recognition of a restitutionary claim): see eg Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 452-457.

3 It is not clear whether English law will recognise other claims based on the claimant's necessitous intervention but it is 'possible that it may': see Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 452-453.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/8. NECESSITY/133. The burial cases.

### 133. The burial cases.

Where, upon the failure or inability of the person responsible for arranging the burial of someone who has died<sup>1</sup>, an appropriate person intervenes and makes the funeral arrangements, the person who does so will be entitled to recover the expenses so incurred from the person responsible for the burial of the body<sup>2</sup>. The person who makes the funeral arrangements must be an appropriate person to do so. This requirement has been interpreted to include a parent<sup>3</sup>, a sibling<sup>4</sup>, and also a professional undertaker where he was engaged by the brother of the deceased<sup>5</sup>. The expenditure must have been reasonable taking into account the circumstances of the deceased<sup>6</sup>. The person who has intervened must not have done so officiously<sup>7</sup>.

1 The person responsible for the burial of the body is generally the personal representative of the deceased. Where no suitable arrangements have been made for the disposal of the body, it is the responsibility of the local authority to make the necessary arrangements: see the Public Health (Control of Disease) Act 1984 ss 46-48 (s 46 as amended); and CREMATION AND BURIAL vol 10 (Reissue) PARAS 920, 925, 928; ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 900.

2 *Jenkins v Tucker* (1788) 1 Hy BI 90; *Tugwell v Heyman* (1812) 3 Camp 298; *Rogers v Price* (1829) 3 Y & J 28; *Shallcross v Wright* (1850) 12 Beav 558; *Ambrose v Kerrison* (1851) 10 CB 776; *Bradshaw v Beard* (1862) 12 CBNS 344; *Rees v Hughes* [1946] KB 517 at 523, CA, per Scott LJ, and at 527 per Tucker LJ.

3 *Jenkins v Tucker* (1788) 1 Hy BI 90.

4 *Bradshaw v Beard* (1862) 12 CBNS 344.

5 *Rogers v Price* (1829) 3 Y & J 28.

6 *Jenkins v Tucker* (1788) 1 Hy BI 90.

7 *Bradshaw v Beard* (1862) 12 CBNS 344.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/8. NECESSITY/134. Maritime salvage.

### 134. Maritime salvage.

The law of maritime salvage<sup>1</sup> is an obvious exception to the general rule of no recovery for services rendered in a situation of necessity or emergency. The jurisdiction to grant a reward to a salvor has long been exercised by the Court of Admiralty and, while the salvage award usually contains a component which recompenses the salvor for the reasonable value of the services rendered, the award itself cannot be explained in restitutionary terms because it very often exceeds the enrichment which the defendant has obtained at the claimant's expense<sup>2</sup>.

A salvor who wishes to recover a reward must have rendered services on the high seas<sup>3</sup> or at a place within the statutory limits<sup>4</sup>, the thing which has been saved must be a recognised subject of salvage<sup>5</sup>, the claimant must fall within the classification of salvors recognised by the law<sup>6</sup>, the services must have been rendered voluntarily<sup>7</sup>, the thing saved must have come into a position of danger which requires a salvage service in order to preserve it from loss or damage<sup>8</sup>, the services rendered must have achieved some success<sup>9</sup> and the claimant must not generally have been at fault<sup>10</sup>.

The salvor is entitled to a reward and that reward may exceed the reasonable value of the services rendered by the salvor<sup>11</sup>. Further, the salvor will generally be entitled to exercise a maritime lien over the goods which have been salvaged<sup>12</sup>. The fact that the salvor is entitled to recover a sum in excess of the reasonable value of the services which he has rendered indicates that the remedy of the salvor is not truly restitutionary in nature. The case law on maritime salvage may prove to be a useful analogy when seeking to determine the circumstances in which an intervenor may be able to recover at common law<sup>13</sup> but, ultimately, the law of maritime salvage is best viewed as being *sui generis*<sup>14</sup>.

1 As to the law of salvage see further SHIPPING AND MARITIME LAW vol 94 (2008) PARA 876 et seq. As to the right to salvage reward see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 925.

2 Discussions of maritime salvage, however, can be found in the textbooks on the law of restitution: see eg Goff and Jones *The Law of Restitution* (7th Edn, 2007) Ch 18.

3 Thus the jurisdiction does not extend to salvage which takes place in non-tidal waters: *The Goring* [1988] AC 831, [1988] 1 All ER 641, HL.

4 See the Merchant Shipping Act 1894 s 546 (repealed); and SHIPPING AND MARITIME LAW vol 94 (2008) PARAS 927, 975.

5 At common law this consisted of the vessel, its apparel, cargo, freight and wreck. Thus in *Wells v The Owners of the Gas Float Whitton No 2, The Gas Float Whitton No 2* [1896] P 42, CA (affd [1897] AC 337, HL), the salvage jurisdiction was held not to extend to an unmanned gas float normally used to give light to vessels which had come adrift in a gale. The scope of the salvage jurisdiction has, however, been extended by statute: see eg the Civil Aviation Act 1982 s 87; and AIR LAW vol 2 (2008) PARA 599. See further SHIPPING AND MARITIME LAW vol 94 (2008) PARA 926.

6 The claimant may be either the owner of the vessel which carried out the salvage operation or the person who personally rendered the salvage services. See further SHIPPING AND MARITIME LAW vol 94 (2008) PARA 930 et seq.

7 In other words, the salvor must not have been obliged by the terms of his contract or by the general law to provide the salvage services, nor must he have undertaken the salvage operations in order to save his own life. See further SHIPPING AND MARITIME LAW vol 94 (2008) PARA 932.

8 *Industrie Chimiche Italia Centrale and Cerealfin SA v Tsaviris (Alexander G) Maritime Co, The Choko Star* [1990] 1 Lloyd's Rep 516, CA. See further SHIPPING AND MARITIME LAW vol 94 (2008) PARAS 928-929.

9 *Semco Salvage and Marine Pte Ltd v Lancer Navigation Co Ltd, The Nagasaki Spirit* [1997] AC 455 at 459, [1997] 1 All ER 502 at 504-505, HL, per Lord Mustill; *The Renpor* (1883) 8 PD 115, CA. See also SHIPPING AND MARITIME LAW vol 94 (2008) PARAS 941-942.

10 *The St Blane* [1974] 1 Lloyd's Rep 557; and see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 953. In many cases the relationship between the parties is regulated by a salvage agreement.

11 See *The Telemachus, Tantalus (Owners, Master and Crew) v Telemachus (Owners)* [1957] P 47, [1957] 1 All ER 72; *The Queen Elizabeth* (1949) 82 Ll L Rep 803 at 821 per Willmer J; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 943 et seq.

12 See SHIPPING AND MARITIME LAW vol 94 (2008) PARAS 911, 1014 et seq. As to lien generally see LIEN.

13 Eg in relation to the definition of 'necessity': 'the law of salvage is the leading paradigm of English law's admission of recovery for necessitous intervention and affords a developed scheme for implementing it' (Rose 'Restitution for the Rescuer' (1989) 9 OJLS 167 at 171). The courts have tended not to perceive the law of maritime salvage as an appropriate analogy for cases of necessitous intervention on land: see eg *Sorrell v*

*Paget* [1950] 1 KB 252 at 260, [1949] 2 All ER 609 at 612, CA, per Bucknill LJ; *Owners of the Motor Vessel Tojo Maru v NV Bureau Wijsmuller, The Tojo Maru* [1972] AC 242 at 268, [1971] 1 All ER 1110 at 1114, HL, per Lord Reid of Drem.

14 The courts have not shown any inclination to develop the law of salvage or to expand the scope of any common law claim where the case falls outside the scope of the law of maritime salvage as presently defined: see eg *The Goring* [1988] AC 831, [1988] 1 All ER 641, HL.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/8. NECESSITY/135. Other examples of necessity.

### 135. Other examples of necessity.

A claimant who provides medical services to the victim of an accident who is in immediate need of medical treatment may be entitled to recover the reasonable value of the services rendered from the person who was otherwise liable to provide such treatment<sup>1</sup>. A claimant who discharges a debt owed by the defendant to a third party, having assumed the obligation to pay the debt in a situation of necessity, may be entitled to recover the sum paid in discharge of the debt from the defendant<sup>2</sup>. A claimant who supplies necessities to someone who, at the time of supply, is incapacitated may be entitled to recover the reasonable value of the services so rendered<sup>3</sup>. However, a person who intervenes to save the property of another will not generally be entitled to recover the reasonable value of the services rendered or any expenses incurred in saving the property<sup>4</sup>. A liquidator who provides services to a company which is in liquidation may be entitled to be paid out of the assets of the company the reasonable value of the services which he has provided<sup>5</sup>.

1 *Lamb v Buncie* (1815) 4 M & S 275; *Tomlinson v Bentall* (1826) 5 B & C 738; *Simmons v Wilmot* (1800) 3 Esp 91. An alternative explanation for these cases is that the liability of the defendant to pay for the services rendered was based on his 'free acceptance' of these services: see PARA 127 ante. There is no case in which it has been held that, outside of contract, the provider of medical treatment is entitled to recover from the victim of the accident itself (cf *Shallcross v Wright* (1850) 12 Beav 558). There is, however, Canadian authority to the effect that there is such a right of recovery even in the case where the intervention is unsuccessful: *Matheson v Smiley* [1932] 2 DLR 787.

2 *Owen v Tate* [1976] QB 402 at 409, 411-412, [1975] 2 All ER 129 at 133, 135, CA, per Scarman LJ; *The Zuhal K and Selin* [1987] 1 Lloyd's Rep 151.

3 *Re Rhodes, Rhodes v Rhodes* (1890) 44 ChD 94, CA (albeit that the claim failed on the facts of the case because the claimants were held to have no intention to charge for the services rendered); *Williams v Wentworth* (1842) 5 Beav 325 at 329; *Re Clabbon* [1904] 2 Ch 465. However, in such a case it must be demonstrated that the person suffering from the incapacity has been supplied with 'necessaries' (for the meaning of which see PARA 182 post).

4 *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234 at 248-249, CA, per Bowen LJ; *Nicholson v Chapman* (1793) 2 Hy Bl 254. In both these cases, the claim was one for a lien and in *Falcke v Scottish Imperial Insurance Co* supra the claimant intervened in his own self-interest. Neither case therefore stands as decisive authority against the recognition of a personal claim for the reasonable value of services rendered or the recovery of expenses (see Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 454; Burrows *The Law of Restitution* (2nd Edn, 2002) pp 313-314; Virgo *The Principles of the Law of Restitution* (2nd Edn, 2006) pp 283-303). There is, of course, a considerable degree of difference between a claim for a lien and a personal claim for services rendered: *Peruvian Guano Co Ltd v Dreyfus Bros & Co* [1892] AC 166 at 177, HL, per Lord Macnaghten. See also *Berry v Barbour* 279 P 2d 335 (1954) (an American case in which recovery was allowed in respect of work done to preserve property).

However, a claimant who paid money to have the defendant's horse cared for after the defendant failed to collect the horse was held to be entitled to recover the sum so expended from the defendant: *Great Northern Ry Co v Swaffield* (1874) LR 9 Exch 132. The precise basis on which the claim succeeded is not entirely clear. In Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 452 text and note 52, and Burrows *The Law of Restitution* (2nd Edn, 2002) p 305, the case is treated as an example of agency of necessity (in which case it

should fall within PARA 131 ante) but it was not expressly so classified by the court, where the agency of necessity cases were invoked merely by way of analogy.

5 *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch 32, [1988] 3 All ER 71. Cf *Re Duke of Norfolk's Settlement Trusts* [1982] Ch 61 at 80, [1981] 3 All ER 220 at 231, CA, per Brightman LJ, where in the case of the remuneration of a trustee the existence of the jurisdiction was explained not in restitutionary terms but in terms of the inherent jurisdiction of the court, the basis of which was the 'good administration of trusts'. Similarly, a minority shareholder may be entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the course of the derivative action on behalf of the company: *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA; *Smith v Croft* [1986] 2 All ER 551, [1986] 1 WLR 580. A similar procedure exists whereby a trustee may be entitled to an indemnity from the beneficiaries of the trust in respect of the costs incurred by the trustee in bringing an action on behalf of the trust: see *Re Beddoe* [1893] 1 Ch 547, CA; *McDonald v Horn* [1995] 1 All ER 961, [1995] ICR 685, CA. These cases can be rationalised as examples of claims to recover the value of services rendered in a situation of necessity. See also *Re Axa Equity & Law Life Assurance Society plc*, *Re Axa Sun Life plc* [2001] 1 All ER (Comm) 1010 (policyholder opposing novel scheme concerning insurance business entitled to costs on pre-emptive basis).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/8. NECESSITY/136. Defences.

### 136. Defences.

In so far as the law allows a claim to recover the value of money paid, goods supplied or services rendered in a situation of necessity, the claim may be met by one or more of a range of defences. In addition to the standard defences which exist to a restitutionary claim<sup>1</sup>, the defendant may be able to resist the claim on the ground that there was a more appropriate person than the claimant who was ready and willing to act<sup>2</sup>, or that the claimant had acted officiously in the circumstances<sup>3</sup>.

1 As to the defences to a restitutionary claim see PARA 165 et seq post.

2 *Re Rhodes, Rhodes v Rhodes* (1890) 44 ChD 94 at 107, CA, per Lindley LJ. See also the burial cases, where the courts placed emphasis on the fact that the claimant must have been an 'appropriate person' to intervene in the circumstances: see PARA 133 ante.

3 See eg *Macclesfield Corpn v Great Central Rly Co* [1911] 2 KB 528, CA. A claimant may be held to have acted officiously where he has acted contrary to the wishes of the defendant or, as in *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234, CA, where he has acted in his own self-interest.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/8. NECESSITY/137. Remedies.

### 137. Remedies.

A claimant who can establish a cause of action arising out of his intervention in a situation of necessity may be entitled to recover the expenses which he has incurred in saving the life or the property of the defendant or otherwise dealing with the emergency or necessity which has arisen<sup>1</sup>. More difficult is the claim for payment for services rendered by the intervenor. Where the claimant is a professional a claim to recover the value of services rendered is more likely to succeed<sup>2</sup> than a claim for payment by an amateur or a member of the public who intervenes<sup>3</sup>. The claim to recover is generally a personal claim to recover money paid or the value of the goods supplied or services rendered but, in the case of a maritime salvage, the salvor is also entitled to exercise a lien over the goods saved<sup>4</sup>.

1 See eg the burial cases (such as *Jenkins v Tucker* (1788) 1 Hy Bl 90: see PARA 133 ante; and CREMATION AND BURIAL vol 10 (Reissue) PARA 935 et seq), where the claimant who had paid for the funeral was held to be entitled to recover the expenses incurred from the person responsible for making the funeral arrangements.

2 See eg *Rogers v Price* (1829) 3 Y & J 28. See also the American case of *Berry v Barbour* 279 P 2d 335 (1954).

3 So, for example, in *The Goring* [1988] AC 831, [1988] 1 All ER 641, HL, the claimants should not have had a claim at common law because they were amateur rescuers.

4 See PARA 134 ante. As to maritime lien see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1014 et seq; and as to lien generally see LIEN.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/9. INCAPACITY/138. Introduction.

## 9. INCAPACITY

### 138. Introduction.

Incapacity may act either as a ground on which restitution is sought<sup>1</sup> or it may act as a defence to a restitutionary claim brought against the person suffering from the incapacity<sup>2</sup>. Incapacity does not necessarily confer on the party suffering from the incapacity a right to recover the value of any benefit which has been conferred by the incapax on another party<sup>3</sup>. In some cases it is necessary for the incapax to establish the existence of one or other of the standard grounds on which a court can order restitution<sup>4</sup>.

1 See PARA 139 et seq post.

2 As to the operation of incapacity as a defence to a restitutionary claim see PARAS 143, 180-184 post.

3 Thus the fact of minority does not of itself confer on the minor a cause of action in restitution: see PARA 139 post.

4 Eg total failure of consideration: see PARA 87 et seq ante.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/9. INCAPACITY/139. Minority.

### 139. Minority.

Minors<sup>1</sup> have limited contractual capacity: some contracts entered into by a minor are voidable but the vast majority of contracts do not bind the minor unless he ratifies them on reaching adulthood<sup>2</sup>. However, the fact that the contract does not bind the minor does not of itself entitle the minor to recover the value of benefits which have been conferred by the minor on the other party to the contract<sup>3</sup>. A minor who wishes to recover money paid under a contract which he has elected to avoid can only do so where he can show that there has been a total failure of consideration for the payment which has been made<sup>4</sup>. Where the minor confers a gift on another party, the fact of minority would appear not to confer on the minor a right to recover the value of the gift so conferred<sup>5</sup>.

1 The age of majority is 18: see the Family Law Reform Act 1969 s 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1; CONTRACT vol 9(1) (Reissue) PARA 630.

2 As to the contractual capacity of minors see further CONTRACT vol 9(1) (Reissue) PARA 630. See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq.

3 In other words, the question whether the minor is entitled to rescind the contract is a separate question from the question whether or not the minor is entitled to recover the value of any benefit conferred under the contract: *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452 at 458, CA, per Lord Sterndale MR. Restitution does not flow automatically from the invalidity of the contract.

4 *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, CA; *Pearce v Brain* [1929] 2 KB 310. Although it can be argued, on the basis of *Valentini v Canali* (1889) 24 QBD 166, that the true principle is that the minor is entitled to recover even upon a partial failure of consideration provided that the minor can make restitutio in integrum (in other words, restore to the defendant the value of the benefit which he has obtained at the defendant's expense). Similarly a minor may be unable to recover property which he has transferred to the defendant. Thus in *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71 at 94, [1965] 3 All ER 764 at 773, CA, Danckwerts LJ stated that 'if an infant revokes a contract, the property and interest which have been previously transferred by him cannot be recovered by the infant. The transfers of property made by [the infant] remain effective against him, even if the contract is otherwise revocable' (cf the dissenting judgment of Lord Denning MR, who would have allowed the minor to recover the copyright transferred provided that he returned the money which he received from the defendants).

5 *Earl of Buckinghamshire v Drury* (1761) 2 Eden 60 at 72, HL, per Lord Mansfield. But the point appears not to be covered by modern authority and may be open to further examination (see Burrows *The Law of Restitution* (2nd Edn, 2002) p 416: 'By analogy to the restitution of contractual benefits one would have expected a minor to be able to repudiate a gift, and to have restitution, within a short time after becoming 18').

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/9. INCAPACITY/140. Mental incapacity and drunkenness.

#### **140. Mental incapacity and drunkenness.**

The contractual capacity of a person who suffers from a mental illness depends on the extent of that illness<sup>1</sup>. Where the mental illness or disorder is such that a person is incapable, by reason of the mental disorder, of managing and administering his property and affairs he may be brought under the jurisdiction of the Court of Protection<sup>2</sup>. Any gift made by a person who is under the protection of the court is void and so recoverable<sup>3</sup>, and any contract which purports to dispose of that person's property and which was entered into without the authority of the court does not bind the person who is the subject of the court's jurisdiction unless it is ratified by the court, and any benefit conferred upon the other party may be recovered by the court on behalf of the mentally incapacitated person<sup>4</sup>. Where the person alleged to suffer from the mental incapacity retains control over his own affairs, any contracts which he has concluded cannot be set aside unless he can prove that the other party either knew or ought to have known of his incapacity<sup>5</sup>. Once the contract has been set aside the person suffering from the incapacity is entitled, subject to defences<sup>6</sup>, to recover the value of benefits conferred under the contract. A gift made by a person who, at the time at which the gift was made, is mentally incapacitated is in principle recoverable<sup>7</sup>. Where the claimant is drunk at the time at which he enters into the contract or confers a gift on the other party, it would appear that the rules which are applicable to mental incapacity are applicable<sup>8</sup>.

1 As to the contractual capacity of drunkards see CONTRACT vol 9(1) (Reissue) PARAS 630, 717. As to the contractual capacity of those of unsound mind see CONTRACT vol 9(1) (Reissue) PARA 630; MENTAL HEALTH vol 30(2) (Reissue) PARA 600 et seq.

2 See the Mental Capacity Act 2005 ss 16, 50.

3 *Re Walker* [1905] 1 Ch 160, CA.

4 *Baldwyn v Smith* [1900] 1 Ch 588.

5 *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, CA; *Hart v O'Connor* [1985] AC 1000 at 1014, [1985] 2 All ER 880 at 884, PC.

6 Eg the requirement that he must give up to the defendant any benefits which he has received from the defendant as a result of his performance under the contract. As to defences generally see PARAS 143, 165 et seq post.

7 *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] AC 776, 1 CLR 243, PC; *Re Beaney* [1978] 2 All ER 595, [1978] 1 WLR 770; *Gibbons v Wright* (1954) 91 CLR 423, Aust HC.

8 There is, however, little authority on point: see *Gore v Gibson* (1845) 13 M & W 623; *Matthews v Baxter* (1873) LR 8 Exch 132.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/9. INCAPACITY/141. Companies.

### 141. Companies.

A company which acts beyond its powers<sup>1</sup> may be entitled to recover the value of a benefit which has been conferred on a party in the performance of the ultra vires act<sup>2</sup>. It can, therefore, recover money paid, the value of goods supplied or the value of services rendered pursuant to the ultra vires contract.

1 The practical significance of the ultra vires doctrine as it affects third parties has been much reduced by the operation of the Companies Act 1985 s 35(1) (as substituted), which provides that the validity of an act done by a company is not to be called into question on the ground of lack of capacity by reason of anything in the company's memorandum: see PARA 184 post; and see also COMPANIES vol 14 (2009) PARA 265. As from a day to be appointed, the Companies Act 1985 s 35(1) is repealed by the Companies Act 2006 s 1295, Sch 16 and replaced by s 39 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 *Brougham v Dwyer* (1913) 108 LT 504; *Bell Houses Ltd v City Wall Properties Ltd* [1966] 1 QB 207, [1965] 3 All ER 427; *International Sales and Agencies Ltd v Marcus* [1982] 3 All ER 551 at 560, [1982] 2 CMLR 46 at 59 per Lawson J; *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016; *Simmonds v Heffer* [1983] BCLC 298; *Precision Dippings Ltd v Precision Dippings Marketing Ltd* [1986] Ch 447, CA; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, [1985] 3 All ER 52, CA. As to the ultra vires doctrine see further COMPANIES vol 14 (2009) PARA 259 et seq.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/9. INCAPACITY/142. Public authorities.

### 142. Public authorities.

A payment made out of the Consolidated Fund without Parliamentary authority is recoverable<sup>1</sup> and, indeed, it may give rise to a proprietary as well as a personal claim<sup>2</sup>. The defences available to this claim may be more limited in that the recipient may not be entitled to rely on estoppel as a defence to the claim<sup>3</sup>. Where a benefit is conferred on another by a local authority acting beyond its powers<sup>4</sup>, the value of the benefit may be recoverable by the local authority, not on the ground of incapacity as such<sup>5</sup>, but on the basis that the benefit was conferred either under a mistake of law<sup>6</sup>, or for a consideration which had totally failed<sup>7</sup>, or on the ground of absence of consideration<sup>8</sup>.

1 *Auckland Harbour Board v R* [1924] AC 318, PC. The scope of the right to recover remains unclear. The Law Commission was of the view that the right of recovery was 'probably limited to payments made by Central Government' (see *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Com no 227) (1994) PARA 17-11) but did not cite any authority for this view other than the fact that in *Auckland Harbour Board v R* supra the right was stated to apply to payments made out of the Consolidated Fund. It was not necessary to consider any wider application of the rule on the facts of that case. As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

2 *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 177, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 763, HL, per Lord Goff of Chieveley. It is submitted that the basis for this view is unclear.

3 *Commonwealth of Australia v Burns* [1971] VR 825. As to estoppel see PARA 170 post; and ESTOPPEL.

4 The Local Government (Contracts) Act 1997 now provides for a self-certification process by local authorities which gives to contracts which have been so certified the benefit of a presumption that the local authority has power to enter into the contract. While the validity of the certificate can be challenged as a matter of public law in judicial review proceedings, it cannot be challenged as a matter of private law. Where the judicial review proceedings are successful, the contractor is entitled to claim compensatory damages from the local authority as if the latter had committed a repudiatory breach of contract. The aim of the Act is, essentially, to protect contracting parties who deal in all good faith with local authorities, unaware of the fact that the local authority has been acting beyond its powers: see further LOCAL GOVERNMENT vol 69 (2009) PARA 411 et seq.

5 In the swaps litigation (see eg *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL) it was not argued that incapacity of itself was the ground on which the local authorities were entitled to restitution. In so far as the local authorities were held to be entitled to restitution on the ground of absence of consideration (see PARA 104 ante) this comes very close, in practical terms, to a recognition that the ultra vires nature of the transaction, which created the absence of consideration, was the reason for restitution.

6 As to mistake see PARA 28 et seq ante; and MISTAKE.

7 As to failure of consideration see PARA 87 et seq ante; and CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

8 As to absence of consideration see PARA 104 ante; and CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/9. INCAPACITY/143. Defences.

### 143. Defences.

A defendant who is faced with a restitutionary claim brought against him by a person who is incapacitated has available to him the usual array of defences<sup>1</sup>, with the exception of a defendant who is sued by the Crown when money has been paid out of the Consolidated Fund without Parliamentary authority<sup>2</sup>. Such a defendant cannot rely on the defence of estoppel<sup>3</sup>.

1 See PARA 165 et seq post.

2 As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

3 *Commonwealth of Australia v Burns* [1971] VR 825. As to estoppel see PARA 170 post; and ESTOPPEL.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/9. INCAPACITY/144. Proprietary claim.

#### 144. Proprietary claim.

The claim of an incapax to recover the value of a benefit conferred on another is generally a personal not a proprietary claim. This is subject to the exception of money paid out of the Consolidated Fund without Parliamentary authority, where the Crown may have a proprietary claim to recover the money so paid<sup>1</sup>.

<sup>1</sup> *Auckland Harbour Board v R* [1924] AC 318, PC. See PARA 142 text and notes 1, 2 ante. As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/10. RECEIPT OF THE CLAIMANT'S PROPERTY/145. The position at common law.

### 10. RECEIPT OF THE CLAIMANT'S PROPERTY

#### 145. The position at common law.

Where the defendant receives property which, at the time of receipt<sup>1</sup>, traceably<sup>2</sup> belongs to the claimant, the defendant may be liable to pay to the claimant the value of the property which he has so received<sup>3</sup>. The liability of the defendant is, in principle, strict; that is to say, liability does not depend upon whether the defendant was dishonest in receiving the property of the claimant or whether he was, in some other way, at fault<sup>4</sup>.

<sup>1</sup> It is the time of receipt which is important. The fact that the defendant no longer retains the property is irrelevant because the claim which is brought is a personal claim and not a proprietary claim.

<sup>2</sup> The word 'traceably' is very important. In *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL, the claimants could not actually show that the money which had been paid to the defendants was their legal property; the money belonged at law to their dishonest partner, and the money was only 'traceably' the claimants' in the sense that, as a result of their power to trace, they could follow their chose or thing in action into the money drawn by the dishonest partner from their bank account. This case is an excellent illustration of the proposition that tracing is a process and not a remedy, so that tracing may be a preliminary to a successful personal claim (see PARAS 18 note 1, 26 note 2 ante). Rather unusually, *Lipkin Gorman (a firm) v Karpnale Ltd* supra is an example of common law tracing (the defendants conceded that if the claimants could establish legal title to the money in the hands of the dishonest partner, that title was not defeated by the mixing of the money with other money of the dishonest partner while in his hands). As to tracing in equity see EQUITY vol 16(2) (Reissue) PARA 861 et seq.

<sup>3</sup> *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL. See also *Clarke v Shee and Johnson* (1774) 1 Cowp 197; *Marsh v Keating* (1834) 1 Bing NC 198, HL; *Calland v Loyd* (1840) 6 M & W 26; *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321, CA; *Nelson v Larholt* [1948] 1 KB 339, [1947] 2 All ER 751. These are all three party cases but a similar principle would appear to operate in two party cases: see *Holiday v Sigil* (1826) 2 C & P 176; *Neate v Harding* (1851) 6 Exch 349. The ground of restitution in these cases has been described by some academic commentators as 'ignorance' (see eg Birks 'Misdirected funds: restitution from the recipient' [1989] LMCLQ 296; Burrows *The Law of Restitution* (2nd Edn, 2002) Ch 4; McKendrick 'Restitution, Misdirected Funds and Change of Position' (1992) 55 MLR 377), but this label has not found its way into the language of the courts and it also has its academic critics (see Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 102-109; Virgo *The Principles of the Law of Restitution* (2nd Edn, 2006) Ch 7; Swadling 'A Claim in Restitution?' [1996] LMCLQ 63; Bant 'Ignorance' as a Ground of Restitution -- Can it Survive?' [1998] LMCLQ 18).

<sup>4</sup> *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL. Alternatively, the claimant might seek to bring a claim in conversion against the defendant: see TORT vol 45(2) (Reissue) PARA 548 et seq. The advantage which a claimant might obtain by bringing a claim in tort is that the defendant would not be able to rely on the defence of change of position. As to the defence of change of position see PARA 166 et seq post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/10. RECEIPT OF THE CLAIMANT'S PROPERTY/146. Defences.

## 146. Defences.

Although at law liability of the defendant recipient is strict, the defendant may be able to rely on a defence such as change of position<sup>1</sup> or bona fide purchase for value<sup>2</sup>.

1 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL. As to change of position as a defence see PARA 166 et seq post.

2 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL (albeit that the defence did not succeed on the facts of the case). As to bona fide purchase as a defence see PARA 171 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/10. RECEIPT OF THE CLAIMANT'S PROPERTY/147. The position in equity.

## 147. The position in equity.

Where the property which the defendant has received is property in which the claimant has an equitable proprietary interest<sup>1</sup>, the authorities are not unanimous<sup>2</sup>. Authorities can be found to support the propositions that the liability of the recipient<sup>3</sup> is strict<sup>4</sup>, or is based upon fault<sup>5</sup> or is based on dishonesty<sup>6</sup> or unconscionability<sup>7</sup>.

1 The claimant generally has to trace in equity in order to establish that the defendant has received assets which belong to the claimant. As to tracing in equity see EQUITY vol 16(2) (Reissue) PARAS 861-866.

2 Rationalisation of the authorities may not, however, be far away: see Lord Nicholls 'Knowing Receipt: The Need for a New Landmark' in Cornish, Nolan, O'Sullivan and Virgo (Eds) *Restitution: Past, Present and Future* (1998) Ch 15. See also Birks 'Misdirected funds: restitution from the recipient' [1989] LMCLQ 296; Birks 'The English recognition of unjust enrichment' [1991] LMCLQ 473; Millett 'Tracing the proceeds of fraud' (1991) 105 LQR 71.

3 In order to be a recipient, the defendant must have received the property for his own use and benefit: *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 293, [1992] 4 All ER 385 at 405 per Millett J. The point is an important one because a distinction must be drawn between the recipient of property which belongs in equity to the claimant and a party who simply assists in the fraud on the claimant. The liability of the latter is based upon dishonesty: see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [1995] 3 All ER 97, PC. See also *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377.

4 See *Re Diplock* [1948] Ch 465, [1948] 2 All ER 318, CA; *GL Baker Ltd v Medway Building & Supplies Ltd* [1958] 3 All ER 540, [1958] 1 WLR 1216, CA. *Re Diplock* supra has traditionally been confined as an authority on the administration of estates but it may be used in the future as the foundation for the creation of a general principle of strict liability in equity (in this respect following the position taken at law in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL). But in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 455, [2000] 4 All ER 221 at 235-236, CA, Nourse LJ adopted an approach based on fault and unconscionability (see note 7 infra). It would now appear that it is open to the House of Lords to conclude that liability in equity is strict, subject to defences.

5 *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555; *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, CA; *International Sales and Agencies Ltd v Marcus* [1982] 3 All ER 551, [1982] 2 CMLR 46; *Westpac Banking Corp v Savin* [1985] 2 NZLR 41, CA; *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 291, [1992] 4 All ER 385 at 403 per Millett J; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 739 per Millett J; *Bank of Credit and Commerce International (Overseas) Ltd*

*v Akindele* [2001] Ch 437, [2000] 4 All ER 221, CA; *Houghton v Fayers* [2000] 1 BCLC 511, CA. See also *Citadel General Assurance Co v Lloyds Bank of Canada* [1997] 3 SCR 805.

6 *Carl Zeiss-Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, [1969] 2 All ER 367, CA; *Competitive Insurance Co Ltd v Davies Investments Ltd* [1975] 3 All ER 254, [1975] 1 WLR 1240; *Re Montagu's Settlement Trusts* [1987] Ch 264, [1992] 4 All ER 308; *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 at 374 per Steyn J; *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488, [1993] 1 WLR 484; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 at 903 per Knox J.

7 The Court of Appeal has held that dishonesty is not an essential ingredient of such a claim; it suffices that the defendant's knowledge makes it unconscionable for him to retain the benefit of the receipt: *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 455, [2000] 4 All ER 221 at 235-236, CA, per Nourse LJ. For a criticism of this case see *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28 at [3]-[4], [2004] 1 WLR 1846 at [3]-[4], [2006] 1 BCLC 729 at [3]-[4] per Lord Nicholls of Birkenhead.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/10. RECEIPT OF THE CLAIMANT'S PROPERTY/148. Defences.

### 148. Defences.

If the liability of the defendant in equity is based on dishonesty or fault, then there will be little room for the operation of any of the standard defences to a restitutionary claim<sup>1</sup>. But, to the extent that liability in equity is strict<sup>2</sup>, the defendant will have available to him the standard defences to a restitutionary claim, such as change of position<sup>3</sup> and bona fide purchase for value<sup>4</sup>.

1 Ie in the sense that, if the defendant is at fault or is dishonest, he will not be able to rely on defences such as change of position and bona fide purchase for value (see the text and notes 2-4 infra). See also PARA 147 ante. As to defences generally see PARA 165 et seq post.

2 See PARA 147 note 4 ante.

3 As to change of position as a defence see PARAS 166-169 post.

4 As to bona fide purchase as a defence see PARA 171 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/10. RECEIPT OF THE CLAIMANT'S PROPERTY/149. Proprietary claims.

### 149. Proprietary claims.

The basis of the claim in these cases is that the defendant has received property which, either at law or in equity, traceably belongs to the claimant<sup>1</sup>. Such a claim is generally a personal claim<sup>2</sup>, not a proprietary one<sup>3</sup>. A claimant who wishes to bring a proprietary claim must establish not only that the defendant received property which belongs to him but that the defendant still retains that property and that the case is one in which the grant of a proprietary remedy is justified<sup>4</sup>.

1 As to tracing in equity see EQUITY vol 16(2) (Reissue) PARAS 861-866.

2 See eg *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL.

3 This fact is often obscured by the use of phrases such as 'constructive trust' and 'constructive trustee', but the courts have indicated their disapproval of the use of the language of the constructive trust in the present context: see eg *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 at 409, CA, per Millett LJ.

4 Eg by imposing a constructive trust over the assets in the hands of the defendant or imposing an equitable charge or lien over the property to secure the repayment of the amount which the defendant owes to the claimant. As to constructive trusts see TRUSTS vol 48 (2007 Reissue) PARA 687 et seq. As to liens generally see LIEN.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(1) INTRODUCTION/150. In general.

## 11. RESTITUTION FOR WRONGS

### (1) INTRODUCTION

#### 150. In general.

Restitution may be sought to redress unjust enrichment by wrongdoing<sup>1</sup>. In equity the courts have been willing to protect the interests of those in relationships with fiduciaries or in confidential relationships, by requiring defendants who act in breach of fiduciary duty or in breach of confidence to hold on trust gains made or to account for profits gained through the relevant breach of duty<sup>2</sup>. However, at common law, the courts have not been prepared to require a defendant in a breach of contract claim to pay damages on the basis of the profits made as a result of the breach<sup>3</sup>. In relation to actions in tort, in certain circumstances, where the tort protects the title to, or possession of, property, the courts will award damages based on the gain made by the tortfeasor<sup>4</sup>. It should be noted that in such cases, the courts have tended to regard the focus of restitution as being the measure of damages to be awarded to the claimant, rather than the nature of the cause of action itself. The defendant's enrichment is regarded as being 'at the expense' of the claimant in the sense of being the result of his wrongdoing (rather than by subtraction from the claimant's resources)<sup>5</sup>.

The proceeds of crime may also be recovered by a confiscation order under the criminal legislation<sup>6</sup>.

1 Eg for the benefits derived from fraud, breach of fiduciary duty or breach of confidence, or torts. See PARA 151 et seq post.

2 As to restitution for benefits acquired by breach of a fiduciary duty see PARAS 154-156 post. As to restitution for benefits acquired by breach of confidence see PARAS 157-158 post.

3 See PARA 159 post.

4 See PARA 160 et seq post.

5 See PARA 18 ante.

6 See the Proceeds of Crime Act 2002; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 390 et seq.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(2) BENEFITS ACQUIRED BY FRAUD/151. Money obtained by fraud on claimant.

## (2) BENEFITS ACQUIRED BY FRAUD

### 151. Money obtained by fraud on claimant.

A defendant who has obtained money from the claimant<sup>1</sup> by fraud<sup>2</sup>, whether by fraudulent misrepresentation<sup>3</sup> or fraudulent concealment of material facts<sup>4</sup>, is liable to an action for restitution, and interest may be recovered on the money obtained<sup>5</sup>. Thus the action lies at the suit of a trustee in bankruptcy against a creditor who has received money, or goods later converted into money, from the bankrupt by way of preference<sup>6</sup>.

Where the claimant has himself been party to the fraud he may nevertheless recover if he is not at fault equally with the defendant<sup>7</sup>. However, the right to sue for restitution of money paid by reason of a fraud is subject to the rule that recourse can only be had to this form of action so long as the claimant and the defendant can be restored to their original positions; otherwise the remedy is an action for deceit<sup>8</sup>.

1 As to money obtained from the claimant's agent see PARA 152 post.

2 As to fraud generally see further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 309 et seq; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 755 et seq. A restitutionary claim on this basis may well be regarded as involving subtractive unjust enrichment (see PARA 18 ante) rather than restitution for wrongdoing (in the sense of stripping the gain made by the wrongdoer).

3 See eg *Kettlewell v Refuge Assurance Co Ltd* [1908] 1 KB 545, CA (affd sub nom *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243, HL). See also *Hogan v Shee* (1797) 2 Esp 521; *Crockford v Winter* (1807) 1 Camp 124; *Holt v Ely* (1853) 1 E & B 795; *Andrews v Hawley* (1857) 26 LJ Ex 323. For a case where the claimant after discovering the fraud affirmed a transaction and was held not to be entitled subsequently to claim a repayment of money paid under it, even upon a subsequent discovery of a further incident in the same fraud see *Campbell v Fleming* (1834) 1 Ad & El 40; and see also *Miles v Dell* (1821) 3 Stark 23 at 26.

4 *Early v Garrett* (1829) 9 B & C 928 at 932; *Billing v Ries* (1841) Car & M 26; *Edmeads v Newman* (1823) 1 B & C 418; *Martin v Morgan* (1819) 3 Moore CP 635; *Kendal v Wood* (1870) LR 6 Exch 243, Ex Ch.

5 *Johnson v R* [1904] AC 817 at 822, PC. As to remedies for misrepresentation and fraud see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 789 et seq.

6 See the Insolvency Act 1986 s 340(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 657. For the right of a trustee in bankruptcy to recover money paid under an illegal contract see CONTRACT vol 9(1) (Reissue) PARA 880.

7 The cases illustrating this rule are mostly cases of fraudulent preference of creditors: *Smith v Bromley* (1760) 2 Doug KB 696 at 697; *Smith v Cuff* (1817) 6 M & S 160; *Atkinson v Denby* (1862) 7 H & N 934, Ex Ch; *Re Lenzberg's Policy* (1877) 7 ChD 650. See also *Bradshaw v Bradshaw* (1841) 9 M & W 29; *Geere v Mare* (1863) 2 H & C 339. Where, however, the defendant has paid over money so received to the claimant's trustee in bankruptcy, he cannot be made to pay over again to the bankrupt, because a *jus tertii* has intervened, and the money has found its way to the rightful owner: *Sievers v Boswell* (1841) 4 Scott NR 165. As to the recovery of money paid under an illegal contract see CONTRACT vol 9(1) (Reissue) PARA 883 et seq.

8 *Clarke v Dickson* (1858) EB & E 148.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(2) BENEFITS ACQUIRED BY FRAUD/152. Money obtained by fraud on the claimant's agent.

### 152. Money obtained by fraud on the claimant's agent.

In the case of money belonging to a principal being obtained from his agent by fraud, either the principal or the agent may claim its recovery back in restitution<sup>1</sup>. Where a person, who

professes to be acting on behalf of a debtor but who has no authority to do so, requests a third person to advance money to the debtor and the third person places the money in the control of the debtor or the debtor's agent, and the debtor, or an agent authorised by him to pay off his debts, uses the money to discharge such debts, a court of equity will treat the lender as entitled to recoup from the debtor a sum equal to the amount used in discharging the debts<sup>2</sup>. The lender cannot, however, claim to be recouped where the use of the money, as well as the initial borrowing, was wholly unauthorised by the debtor, even though it has been used in discharging the debtor's debts and liabilities<sup>3</sup>.

1 *Holt v Ely* (1853) 1 E & B 795; *Litt v Martindale* (1856) 18 CB 314 (the defendant, having fraudulently obtained the claimant's money out of the hands of his agent, claimed to retain it against a debt due to him from the agency); and see *Stevenson v Mortimer* (1778) 2 Cowp 805. As to an agent's right to sue in the absence of fraud see AGENCY vol 1 (2008) PARA 169.

2 See *Re Cleadon Trust Ltd* [1939] Ch 286 at 321-328, [1938] 4 All ER 518 at 539-544, CA, per Clauson LJ (explaining the decisions in *Jenner v Morris* (1861) 3 De GF & J 45; *Re Cork and Youghal Rly Co* (1869) 4 Ch App 748; *Reid v Rigby & Co* [1894] 2 QB 40; *Bannatyne v MacIver* [1906] 1 KB 103, CA; *Reversion Fund and Insurance Co Ltd v Maison Cosway Ltd* [1913] 1 KB 364, CA; *AL Underwood Ltd v Bank of Liverpool*, *AL Underwood Ltd v Barclays Bank* [1924] 1 KB 775, CA; *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48). See also *Marsh v Keating* (1834) 1 Bing NC 198, HL; *Re Japanese Curtains and Patent Fabric Co, ex p Shoolbred* (1880) 28 WR 339. See also AGENCY vol 1 (2008) PARA 124.

3 *Re Cleadon Trust Ltd* [1939] Ch 286, [1938] 4 All ER 518, CA.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(2) BENEFITS ACQUIRED BY FRAUD/153. Services etc obtained by fraud or wrong.

### **153. Services etc obtained by fraud or wrong.**

It is an axiom of the law that no person will be permitted to take advantage of his own fraud or wrong<sup>1</sup>, and accordingly in certain circumstances there will be a claim to restitution where one person induces another to perform a service without intending to pay for it<sup>2</sup>. For example, if a person travels by railway without a ticket, intending to avoid payment of his fare<sup>3</sup>, or carries luggage with an excursion ticket issued on condition that no luggage is to be taken<sup>4</sup>, or takes merchandise as personal luggage<sup>5</sup>, he can be sued in respect of the amount of the fare or for the carriage of the luggage, as the case may be. On the same principle, a person who fraudulently induces another to sell goods to a third person whom he knows to be insolvent is liable to pay the price<sup>6</sup>, and a person who clandestinely abstracts gas which has not passed through the meter may be sued in respect of the price of the gas<sup>7</sup>.

The obligations created by the application of the principles of general average<sup>8</sup> and salvage<sup>9</sup> are considered elsewhere in this work.

1 *Hill v Perrott* (1810) 3 Taunt 274.

2 *Rumsey v North Eastern Rly Co* (1863) 14 CBNS 641; *Lightly v Clouston* (1808) 1 Taunt 112 (A wrongfully induced B's apprentice to work for him; held that B might sue for the value of the services in an action for work and labour); *Foster v Stewart* (1814) 3 M & S 191 (similar case).

3 *London and Brighton Rly Co v Watson* (1879) 4 CPD 118, CA. He cannot, however, be sued on an implied contract to pay a sum in the nature of a penalty under a byelaw, as in the case of a byelaw providing that a passenger travelling without a ticket should pay the fare from the place from which the train commenced the journey: *London and Brighton Rly Co v Watson* supra.

4 *Rumsey v North Eastern Rly Co* (1863) 14 CBNS 641.

5 *Britten v Great Northern Rly Co* [1899] 1 QB 243.

6 *Hill v Perrott* (1810) 3 Taunt 274. See also *Abbotts v Barry* (1820) 2 Brod & Bing 369, where the defendant, who had fraudulently conspired with an insolvent person to obtain goods from the claimant and received the proceeds in satisfaction of a debt due to him from that insolvent person, was held liable to pay over the proceeds.

7 *Birmingham and Staffordshire Gas Co v Ratcliff* (1871) 40 LJ Ex 136.

8 See CARRIAGE AND CARRIERS vol 7 (2008) PARA 605 et seq; INSURANCE vol 25 (2003 Reissue) PARA 420 et seq; SHIPPING AND MARITIME LAW vol 93 (2008) PARA 133.

9 See SHIPPING AND MARITIME LAW vol 94 (2008) PARA 876 et seq. See also SHIPPING AND MARITIME LAW vol 93 (2008) PARA 113 et seq; INSURANCE.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(3) BENEFITS ACQUIRED BY BREACH OF A FIDUCIARY RELATIONSHIP/154. Liability of fiduciary.

### **(3) BENEFITS ACQUIRED BY BREACH OF A FIDUCIARY RELATIONSHIP**

#### **154. Liability of fiduciary.**

A fiduciary<sup>1</sup> who uses his position of trust to acquire a benefit for himself will be required to hold that benefit on constructive trust for his beneficiary<sup>2</sup>. However, not every breach of duty or of contract by a fiduciary will be a breach of fiduciary duty<sup>3</sup>.

A trustee may generally not enter into any engagement in which he has, or could have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect, so that any purchase of trust property by a trustee is voidable at the option of the beneficiaries<sup>4</sup>. If the trustee has sold the property he can be made to account for any profit made together with interest<sup>5</sup>.

Similarly, a sale by a trustee of his own property to the beneficiaries is liable to be set aside if the trustee has not made full and proper disclosure of his interest in the property<sup>6</sup>. It is immaterial whether the price was unfair or the trustee acted dishonestly. The beneficiary may be able to obtain relief by way of an account of profits made by the trustee from the sale, provided that the property was acquired by the trustee after he became a fiduciary<sup>7</sup>.

If a trustee abuses his position of trust by diverting a contract or opportunity from the beneficiary to himself, he will be deemed to hold any gain made on trust for the beneficiary and it is irrelevant that the trustee acted in good faith, or that the beneficiary lacked the funds to enter into the transaction or that the third party was unwilling to deal with the beneficiary<sup>8</sup>.

1 As to fiduciary relationships see further EQUITY vol 16(2) (Reissue) PARA 851 et seq; TRUSTS vol 48 (2007 Reissue) PARAS 695-697, 954 et seq.

2 *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC. See further TRUSTS vol 48 (2007 Reissue) PARA 697.

3 *A-G v Blake* [1998] Ch 439, [1998] 1 All ER 833, CA; affd [2001] 1 AC 268, [2000] 4 All ER 385, HL.

4 See *Campbell v Walker* (1800) 5 Ves 678 at 682; *Ex p Lacey* (1802) 6 Ves 625 at 627; *Ex p James* (1803) 8 Ves 337; *Aberdeen Rly Co v Blaikie Bros* (1854) 1 Macq 461 at 471-472, HL; *Williams v Scott* [1900] AC 499, PC; *Wright v Morgan* [1926] AC 788, PC.

5 *Hall v Hallet* (1784) 1 Cox Eq Cas 134; *Ex p James* (1803) 8 Ves 337 at 351. If the property is unsold, the beneficiary may require it to be reconveyed to the trust or to be sold under the direction of the court: see

*Holder v Holder* [1968] Ch 353, [1966] 2 All ER 116. See also *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] 32 LS Gaz R 31.

6 *Bentley v Craven* (1853) 18 Beav 75; *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189; *Armstrong v Jackson* [1917] 2 KB 822; *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, [1967] 2 All ER 14.

7 *Tyrrel v Bank of London* (1862) 10 HL Cas 26; *Re Cape Breton Co* (1885) 29 ChD 795 at 803-804, CA, per Cotton LJ. If, however, the property was acquired by the trustee before he became a fiduciary, the beneficiary will not normally be able to claim the profit made by the trustee: *Re Cape Breton Co* supra at 805 per Cotton LJ; *Robinson v Randfontein Estates* [1921] App D 168.

8 *Keech v Sandford* (1726) Cas temp King 61; *Cook v Deeks* [1916] 1 AC 554, PC; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n, at 144, 149, [1942] 1 All ER 378 at 386, 389, HL, per Lord Russell of Killowen, and at 156-157 and 394 per Lord Wright; *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, [1972] 1 WLR 443.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(3) BENEFITS ACQUIRED BY BREACH OF A FIDUCIARY RELATIONSHIP/155. Bribes and secret commissions.

### 155. Bribes and secret commissions.

Fiduciaries<sup>1</sup> and non-fiduciaries alike are liable to account for the payment of any secret commission or bribe received in the course of his relationship with the principal<sup>2</sup>. The fiduciary will be liable to account to his principal for the amount of the bribe, and it is irrelevant that the principal suffered no loss as a result of the defendant's corrupt bargain<sup>3</sup>. It has also been held that the fiduciary is not only personally liable to account for the bribe but also that he holds it on constructive trust for the principal<sup>4</sup>.

1 See PARA 154 ante. As to fiduciary relationships see further EQUITY vol 16(2) (Reissue) PARA 851 et seq; TRUSTS vol 48 (2007 Reissue) PARAS 695-697, 954 et seq.

2 *Reading v A-G* [1948] 2 KB 268, [1948] 2 All ER 27 (affd [1949] 2 KB 232, sub nom *Re Reading's Petition of Right* [1949] 2 All ER 68, CA; *Reading v A-G* [1951] AC 507, [1951] 1 All ER 617, HL); *A-G v Observer Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers (No 2)* [1988] 3 All ER 545, HL; *A-G for Hong Kong v Reid* [1994] 1 AC 324 at 330-331, [1994] 1 All ER 1 at 4-5, PC; *Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd* [1997] 2 All ER 917, [1997] 1 WLR 1396. See also *Dubai Aluminium Co Ltd v Al Alawi* [2002] EWHC 2051 (Comm), 5 ITEL 376 (onus of proof on principal to show payment received dishonestly).

3 *Parker v McKenna* (1874) 10 Ch App 96; *Re North Australian Territory Co* [1892] 1 Ch 322, CA; *Williams v Barton* [1927] 2 Ch 9; *Reading v A-G* [1948] 2 KB 268 (affd [1949] 2 KB 232, sub nom *Re Reading's Petition of Right* [1949] 2 All ER 68, CA; *Reading v A-G* [1951] AC 507, [1951] 1 All ER 617, HL). The principal can elect to claim damages in respect of the actual loss sustained instead of the bribe: see *Mahesan v Malaysia Government Officers' Co-operative Housing Society* [1979] AC 374, [1978] 2 All ER 405, PC.

4 *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC, disapproving on this point *Lister & Co v Stubbs* (1890) 45 ChD 1, CA. Given that *Lister & Co v Stubbs* supra, being a decision of the Court of Appeal, is binding on English courts up to the Court of Appeal, whereas *A-G for Hong Kong v Reid* supra, being a decision of the Privy Council is not, it is not clear how a court of first instance would deal with this issue. See, however, *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) at [85], [2005] Ch 119 at [85], [2005] 4 All ER 73 at [85] per Lawrence Collins J. As to constructive trusts see TRUSTS vol 48 (2007 Reissue) PARA 687 et seq.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(3) BENEFITS ACQUIRED BY BREACH OF A FIDUCIARY RELATIONSHIP/156. Knowing receipt of trust property and dishonest assistance.

## **156. Knowing receipt of trust property and dishonest assistance.**

The liability of a person for receiving trust property in the knowledge that it was transferred to him in breach of trust and the liability for dishonestly assisting in a breach of trust (without actually receiving any trust property) are considered elsewhere in this work<sup>1</sup>.

<sup>1</sup> See PARA 147 ante; and EQUITY vol 16(2) (Reissue) PARA 851 et seq; TRUSTS vol 48 (2007 Reissue) PARA 698 et seq.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(4) BENEFITS ACQUIRED BY BREACH OF CONFIDENCE/157. Basis of liability for misuse of confidential information.

## **(4) BENEFITS ACQUIRED BY BREACH OF CONFIDENCE**

### **157. Basis of liability for misuse of confidential information.**

In some cases a claimant will be able to rely on an express or implied term of a contract whereby the defendant agreed to preserve the confidentiality of certain kinds of information<sup>1</sup>. However, where the claimant cannot rely on a contract, he can have recourse to the broad principle of equity that a person who has received information in confidence must not take unfair advantage of it and cannot make use of it to the prejudice of the provider of the information without his consent<sup>2</sup>. The duty to keep information confidential will arise when confidential information comes to the knowledge of a person in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others<sup>3</sup>.

<sup>1</sup> See eg *United Sterling Corpn Ltd v Felton and Mannion* [1974] RPC 162, [1973] FSR 409; *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, [1986] 1 All ER 617, CA; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARAS 404, 421.

<sup>2</sup> See *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA. See also *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, [1968] FSR 415; *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92, CA; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 406.

<sup>3</sup> See *A-G v Observer Ltd* [1990] 1 AC 109 at 281, sub nom *A-G v Guardian Newspapers (No 2)* [1988] 3 All ER 545 at 658, HL, per Lord Goff of Chieveley; *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, [1995] 1 WLR 804; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 406.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(4) BENEFITS ACQUIRED BY BREACH OF CONFIDENCE/158. Restitution as a remedy.

### **158. Restitution as a remedy.**

There are a number of remedies available to the person seeking relief in respect of a breach of confidence<sup>1</sup>, including an injunction to restrain the use of confidential information, delivery up or destruction of documents<sup>2</sup>, damages for loss suffered<sup>3</sup>, and restitution in the form of an account of profits or relief on a quantum meruit basis in respect of the use of the information.

The court may order an account of profits so as to prevent the defendant obtaining an unjust enrichment<sup>4</sup>. The defendant will be required to account for all profits made by the defendant from his breach of confidence<sup>5</sup>.

A claimant may also elect, instead of an account of profits, to recover the reasonable value of the information conveyed<sup>6</sup>. Such a claim, by way of quantum meruit, may be more attractive if the defendant has made little or no profit from the use of the information or the process of calculation is too complex<sup>7</sup>.

The claimant may be able to assert a constructive trust in respect of certain assets acquired by the defendant by means of the confidential information, provided that it can be shown that the defendant's conduct was unconscionable<sup>8</sup>.

1 As to breach of confidence see PARA 157 ante; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARAS 480-482.

2 See CIVIL PROCEDURE vol 11 (2009) PARA 475; CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARAS 492-493; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 803.

3 See DAMAGES vol 12(1) (Reissue) PARA 1126.

4 *My Kinda Town v Soll* [1983] RPC 15 at 55, [1982] FSR 147 at 156 per Slade J.

5 *My Kinda Town v Soll* [1983] RPC 15 at 54, [1982] FSR 147 at 154 per Slade J; *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96; *House of Spring Gardens Ltd v Point Blank Ltd* [1983] FSR 489.

6 *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809, CA; *Universal Thermosensors Ltd v Hibben* [1992] 3 All ER 257, [1992] 1 WLR 840 (compensatory damages awarded on the basis of the 'user' principle, namely the value of their use to the defendant).

7 As to quantum meruit claims see PARA 113 et seq ante.

8 *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, Can SC; cf *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 715, [1996] 2 All ER 961 at 997, HL, per Lord Browne-Wilkinson. As to constructive trusts see further TRUSTS vol 48 (2007 Reissue) PARA 687 et seq.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(5) BENEFITS ACQUIRED BY OTHER WRONGDOING/159. Claims in contract.

## **(5) BENEFITS ACQUIRED BY OTHER WRONGDOING**

### **159. Claims in contract.**

Until recently there had been no case (aside from those involving fiduciaries<sup>1</sup>) in which a claimant had succeeded in recovering damages for breach of contract measured by the profits which the party in breach gained by his breach of contract. The courts generally perceived an award of restitutionary damages as unwarrantedly punitive of the defendant, and reiterated the general principle that the purpose of damages for breach of contract was to compensate the claimant and not to punish the defendant<sup>2</sup>. However, the House of Lords has now held that where damages (or specific performance or injunctions) are not an adequate remedy and, exceptionally, a just response to a breach of contract so requires, the courts should be able to grant the discretionary remedy of requiring the defendant to account to the claimant for the benefits he has received from his breach of contract<sup>3</sup>. Such a remedy may only be granted in

exceptional circumstances and when a breach is carried out in a commercial context this may lead the court to conclude that an account of profits is not appropriate<sup>4</sup>.

1 See PARAS 154-156 ante.

2 See *Tito v Waddell (No 2)* [1977] Ch 106, [1977] 3 All ER 129; *Stoke-on-Trent City Council v W and J Wass Ltd* [1988] 3 All ER 394 at 400, [1988] 1 WLR 1406 at 1414, CA, per Nourse LJ; *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281-282, CA, per Thomas Bingham MR, and at 211-212 and 291 per Millett LJ. As to damages for breach of contract see further DAMAGES vol 12(1) (Reissue) PARA 941 et seq.

In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798, Brightman J awarded damages for breach of a restrictive covenant on the basis of the value of the defendant's use of the property in question, although the claimant could not show any actual loss and took the position that it would not have released the covenant if asked. In *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, Steyn LJ commented that *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* supra was explicable only on the basis that restitutionary damages could be awarded and that the object of the award was not to compensate the claimant for financial loss but to deprive the defendants of an unjustly acquired gain. However, on that basis, the reasoning in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* supra was disapproved: see *Surrey County Council v Bredero Homes Ltd* supra at 711-712 and 1366-1367 per Dillon LJ, and at 715 and 1370 per Steyn LJ.

This position has now been reversed by the decision of the House of Lords in *A-G v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268 at 283, [2000] 4 All ER 385 at 396, HL, per Lord Nicholls of Birkenhead, where *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* supra was expressly approved and *Surrey County Council v Bredero Homes Ltd* supra in so far as inconsistent with the approach adopted in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* supra was disapproved. See also *Amec Developments Ltd v Jury's Hotel Management (UK) Ltd* (2000) 82 P & CR 286, [2001] 1 EGLR 81 (breach of restrictive covenant affecting land; damages awarded representing a percentage of the profit anticipated from the activity constituting the breach); *Lane v O'Brien Homes Ltd* [2004] EWHC 303 (QB), [2004] All ER (D) 61 (Feb).

3 *A-G v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, [2000] 4 All ER 385, HL. 'No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit': *A-G v Blake (Jonathan Cape Ltd, third party)* supra at 285 and 398 per Lord Nicholls of Birkenhead, expressly disapproving the suggestion in the Court of Appeal that there are two situations which might require an award of restitutionary damages: (1) where the defendant fails to provide the full extent of the services which he has contracted to provide and for which he has charged the claimant, whereby the defendant has saved himself expense and the claimant cannot prove any actual loss; and (2) where the defendant has obtained his profit by doing the very thing which he had contracted not to do (see [1998] Ch 439 at 458, [1998] 1 All ER 833 at 845-846, CA, per Lord Woolf MR).

4 See *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323 at [44], [2003] 1 All ER (Comm) 830 at [44] per Mance LJ (although an account of profits was not ordered, the court thought it would be anomalous and unjust if the defendants avoided paying any sum for breaching the contract; the defendants were ordered to pay the amount that could reasonably have been demanded by the claimants for agreeing to permit the licences into which the defendants had entered in breach of the agreement). Following the decision in *A-G v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, [2000] 4 All ER 385, HL, there have been a number of other cases where the remedy of account of profits was sought, where the dispute arose from a commercial agreement. In *Esso Petroleum v Niad Ltd* [2001] EWHC 6 (Ch), [2001] All ER (D) 324 (Nov), Niad operated a petrol station under the Esso 'pricewatch' scheme under which Niad was obliged to inform Esso of prices charged by local competitors and reduce its own prices if ordered to by Esso. Niad failed to do so on a number of occasions. It was held that an account of profits was the appropriate remedy in this case as damages were inadequate and the pricewatch scheme had been undermined. In contrast, in *AB Corp v CD Co, The Sine Nomine* [2002] 1 Lloyd's Rep 805, an account of profits was not ordered where, in breach of a charter party, the owners withdrew a time-chartered vessel; the arbitrators stated that 'there should not be an award of wrongful profits where both parties are dealing with a marketable commodity for which a substitute can be found in the marketplace' and that moreover 'international commerce on a large scale is red in tooth and claw'. This decision has been criticised as being out of sympathy with *A-G v Blake (Jonathan Cape Ltd, third party)* supra: see Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 532. See also *WWF--World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2007] All ER (D) 13 (April), where an account of profits was refused.

## UPDATE

### 159 Claims in contract

NOTE 4--See *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086, [2009] Ch 390, [2009] 3 All ER 27 (restitutionary award not available as authorities precluded claim for non-proprietary tort).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(5) BENEFITS ACQUIRED BY OTHER WRONGDOING/160. Claims in tort.

## 160. Claims in tort.

There is no unifying principle which governs the circumstances in which a claimant, relying on a cause of action in tort, may recover damages calculated by reference to the defendant's gain<sup>1</sup>. However, there are a number of well-established instances in which such damages may be recovered, namely: wrongful interference with goods<sup>2</sup>, trespass to land<sup>3</sup>, deceit<sup>4</sup>, breach of confidence<sup>5</sup>, and infringement of copyright<sup>6</sup>.

1 As to damages for torts see further DAMAGES vol 12(1) (Reissue) PARA 851 et seq.

2 See *Lamine v Dorrell* (1705) 2 Ld Raym 1216; *Oughton v Seppings* (1830) 1 B & Ad 241; *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL; *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA; and DAMAGES vol 12(1) (Reissue) PARAS 860-867.

3 See *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538, CA; *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359 (where the defendant trespasser failed to remove his pontoon from the claimant's dock and Lord Denning MR, sitting as an additional judge of the Queen's Bench Division, awarded damages despite finding that the claimant would not have made use of the dock at the relevant time and stated that the measure of damages in operation was not what the claimant had lost, but what benefit the defendant had obtained by having use of the berth (at 361-362)); *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 240 at 242, [1979] 1 WLR 285 at 288, CA, per Megaw LJ (where the defendant was a trespasser who had held over at the end of the tenancy and damages were calculated on the basis of the ordinary letting value of the property, while the claimant did not have to adduce evidence that he would have let the property to anyone else); *Ministry of Defence v Ashman* (1993) 66 P & CR 195, 25 HLR 513, CA (where Hoffmann LJ and Kennedy LJ held that they could award a 'restitutionary remedy' against a defendant who had remained in possession of premises after the expiry of a notice to quit and calculated the damages by reference to the value to the defendant (albeit not necessarily the open market value) of continuing occupation (at 146-147)); *Ministry of Defence v Thompson* (1993) 25 HLR 552, [1993] 2 EGLR 107, CA. See also DAMAGES vol 12(1) (Reissue) PARA 868 et seq.

4 *Hill v Perrott* (1810) 3 Taunt 274; *Abbots v Barry* (1820) 2 Brod & Bing 369.

5 See PARAS 157-158 ante. See also *A-G v Observer Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL, where a newspaper was ordered to account for the profits which it made on the publication of an extract from a book ('*Spycatcher*'), knowing that it contained confidential information obtained by the author while working for MI5.

6 *Potton Ltd v Yorkclose Ltd* [1990] FSR 11 at 15, (1989) Times, 4 April, where Millett J stated that an account of profits was ordered to prevent the unjust enrichment of the defendant.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(6) WAIVER OF TORT AND ELECTION BETWEEN PARTIES/161. Waiver of tort.

## (6) WAIVER OF TORT AND ELECTION BETWEEN PARTIES

## 161. Waiver of tort.

There are many circumstances in which a claimant may 'waive' a tort committed against him by the defendant and instead bring a restitutionary claim against the defendant to recover money<sup>1</sup>. Before the abolition of the forms of action, many factors combined to render indebitatus assumpsit<sup>2</sup> a more convenient form of action than an action in trespass or an action on the case<sup>3</sup>; and the fiction was developed that the defendant was the claimant's agent, and that the claimant might 'ratify' the defendant's tortious act and sue to recover from the defendant the proceeds of his tort<sup>4</sup>. There remains today an advantage<sup>5</sup> in suing in restitution rather than tort, namely the avoidance of the necessity of proving the actual loss suffered by the claimant<sup>6</sup>. Moreover, the claimant may wish to claim from the defendant the gain made by the defendant at the expense of the claimant, that is, by reason of the defendant's wrongdoing<sup>7</sup>.

Although this choice between an action in tort or an action in restitution remains for the claimant<sup>8</sup>, it is clear that the old expression 'waiver of tort' is misleading. A claim in tort may be waived, as where the claimant makes a genuine ratification of the unauthorised act of his purported agent<sup>9</sup> or by acceptance of the proceeds obtained by the defendant's tortious dealing with the claimant's property<sup>10</sup>; and, after that, the claimant cannot sue the defendant in tort<sup>11</sup>. The choice between an action in tort or an action in restitution is, however, not really a waiver of tort because the claimant does not condone the wrong, he merely chooses one of two alternative remedies in respect of that wrong.

1 As to account of profits, which restitutionary remedy applies to torts protecting intellectual property rights, see EQUITY vol 16(2) (Reissue) PARA 553; and see further Burrows *The Law of Restitution* (2nd Edn, 2002) pp 466-468.

2 As to indebitatus assumpsit see PARA 4 ante.

3 These factors included the avoidance of special pleading and the circumvention of the common law rule preventing the survival of an action in tort against the estate of the tortfeasor.

4 'No party is bound to sue in tort, where, by converting the action into an action in contract, he does not prejudice the defendant': *Young v Marshall* (1831) 8 Bing 43 at 44 per Tindal CJ.

5 Formerly, proceedings in tort against a deceased person's estate were statute-barred unless they were pending at the date of death or were instituted within six months of the grant of representation: see the Law Reform (Miscellaneous Provisions) Act 1934 s 1(3) (repealed). The time limit did not, however, apply to an action for money had and received against a deceased person's estate: see *Chesworth v Farrar* [1967] 1 QB 407, [1966] 2 All ER 107, where it was held that a claimant could waive the tort and claim the proceeds of a wrongful sale quasi-contractually where the tortious claim was statute-barred. The Law Reform (Miscellaneous Provisions) Act 1934 s 1(3) was repealed on 1 January 1971 in relation to causes of action arising before as well as in relation to causes of action arising after 1 January 1971, but not so as to enable any proceedings to be taken which had ceased to be maintainable before that date: see the Proceedings Against Estates Act 1970 ss 1, 3(2), (3) (repealed); and the Proceedings Against Estates Act 1970 (Commencement) Order 1970, SI 1970/1860. As to statutory limitation periods see the Limitation Act 1980; and LIMITATION PERIODS vol 68 (2008) PARA 952 et seq.

Under the Bankruptcy Act 1914 s 30 (repealed), tortious claims were not provable in bankruptcy or insolvency, so that waiver of tort was a useful mechanism for proof to the extent of the benefits received by the tortfeasor. However, claims for unliquidated damages are now provable: see the Insolvency Act 1986 s 382(1), (2); the Insolvency Rules 1986, SI 1986/1925, r 12.3(1) (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 492.

6 The claimant may claim instead the sum received by the defendant, eg from conversion of the claimant's goods; this sum may exceed what could be recovered in tort: see *Bavins Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA.

7 See PARA 160 ante.

8 See PARA 162 post.

9 See AGENCY vol 1 (2008) PARA 59.

10 See eg *Lythgoe v Vernon* (1860) 5 H & N 180. See also *Horsford v Bird* [2006] UKPC 3, [2006] 1 EGLR 75 (boundary dispute); *Severn Trent Water Ltd v Barnes* [2004] EWCA Civ 570, [2004] 2 EGLR 95 (trespass).

11 *Smith v Baker* (1873) LR 8 CP 350. Cf *Smith v Hodson* (1791) 4 Term Rep 211; *Roe v Mutual Loan Association Fund Ltd* (1887) 19 QBD 347, CA.

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## 162. Election between remedies.

Where the facts and circumstances are such that a claimant has the right, arising from those facts and circumstances, to bring an action for money had and received or to sue in tort<sup>1</sup>, he may elect<sup>2</sup> between those two alternative remedies<sup>3</sup>.

1 For examples of the situations where the claimant has such a choice see PARA 164 post.

2 This election is sometimes wrongly called 'waiver of tort': see PARA 161 ante.

3 For the rules of election see PARA 163 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/11. RESTITUTION FOR WRONGS/(6) WAIVER OF TORT AND ELECTION BETWEEN PARTIES/163. Election of remedy.

## 163. Election of remedy.

Formerly, it was thought that when a claimant began to pursue his restitutionary remedy he had thereby 'waived' the tort<sup>1</sup>. It is now clear, however, that the claimant does not elect one remedy merely by commencing an action in which he claims it; no question of election arises until judgment is entered<sup>2</sup>. Up to that stage the claimant may pursue both remedies together, or pursuing one may amend and pursue the other, but he can take judgment only for the one, and both causes of action will then be merged in the judgment<sup>3</sup>. Thus where a cargo belonging to the claimants was improperly sold, the claimants were not debarred from proceedings against the purchasers for money had and received merely because they had recovered an unsatisfied judgment against the shipowners in an action in tort<sup>4</sup>. Furthermore, where the damage to the claimant has been caused by the acts of more than one tortfeasor, election to waive the tort with respect to one tortfeasor will not bar proceedings in tort against another tortfeasor provided that the later action is in respect of a wrong separate from that committed by the tortfeasor in relation to whom the election was made<sup>5</sup>.

An election which bars the alternative cause of action is made, however, where the claimant receives satisfaction under a judgment<sup>6</sup>. Thus once the claimant obtains damages from the defendant on the footing that the defendant is a wrongdoer, the claimant cannot subsequently maintain a claim in restitution against that defendant<sup>7</sup>. Conversely, once the claimant has received satisfaction from a defendant of a judgment in restitution, he cannot subsequently sue him in tort<sup>8</sup>.

1 See eg *Brocklebank Ltd v R* [1925] 1 KB 52, CA. For criticism of the expression 'waiver of tort' see PARA 161 ante.

2 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 30, [1940] 4 All ER 20 at 38, HL, per Lord Atkin. See also *Rice v Reed* [1900] 1 QB 54, CA.

3 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 30, [1940] 4 All ER 20 at 38, HL, per Lord Atkin. It may be necessary to elect before judgment where a third party is involved: *Ernest Scragg & Sons Ltd v Perseverance Banking and Trust Co Ltd* [1973] 2 Lloyd's Rep 101 at 103, CA, per Lord Denning.

4 *Morris v Robinson* (1824) 3 B & C 196. As to the right of a ship's master to sell cargo see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 444.

5 See *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL, distinguishing *Verschures Creameries Ltd v Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608, CA; but see *Buckland v Johnson* (1854) 15 CB 145 (joint tort).

6 'What would be necessary to constitute a bar . . . would be that, as the result of such judgment or otherwise, the appellant should have received satisfaction': *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 21, [1940] 4 All ER 20 at 31, HL, per Viscount Simon LC; and see at 49 and 50 per Lord Porter.

For merger of a cause of action in judgment in respect of actions in contract see CONTRACT vol 9(1) (Reissue) PARA 1062 et seq.

7 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL (approving the statement of the law in *Hitchin (or Kitchen) v Campbell* (1772) 2 Wm BI 827 at 830; and disapproving the dictum of Bovill CJ in *Smith v Baker* (1873) LR 8 CP 350 at 355).

8 *Smith v Hodson* (1791) 4 Term Rep 211; *Wilson v Poulter* (1730) 2 Stra 859; *Smith v Baker* (1873) LR 8 CP 350; *Roe v Mutual Loan Association Fund Ltd* (1887) 19 QBD 347, CA. Acceptance of the proceeds of the sale of the goods tortiously dealt with amounts to an election to waive the tort: *Brewer and Gregory v Sparrow* (1827) 7 B & C 310; *Armstrong v Allan Bros* (1892) 67 LT 738, CA. Receipt of part of the proceeds does not necessarily do so (*Burn v Morris* (1834) 2 Cr & M 579; *Rice v Reed* [1900] 1 QB 54, CA); but will do so if that is the apparent intention (*Lythgoe v Vernon* (1860) 5 H & N 180). An application for the proceeds of the goods is not conclusive proof of election: *Valpy v Sanders* (1848) 5 CB 886. Where an agent converts the goods of a third person, who elects to waive the tort and sue him for money had and received, the agent is only liable to the extent of the proceeds still remaining in his hands, and not for what he has paid over to the principal in good faith: *Re Ely, ex p Trustee* (1900) 48 WR 693, CA.

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#### 164. Circumstances in which claimant may elect.

Apart from the case of money obtained by fraud on the claimant<sup>1</sup> or his agent<sup>2</sup>, or services obtained from the claimant by fraud<sup>3</sup>, the most usual circumstance in which a claimant is faced with the problem of electing between the two remedies is where the defendant has converted the claimant's goods<sup>4</sup> and later sold them; for the claimant may either sue in tort for conversion and obtain damages, or he may affirm the transaction and sue for the proceeds of sale by way of a claim in restitution<sup>5</sup>. The extent to which a claimant is bound by an election made when all the relevant facts were not before him has not yet been determined<sup>6</sup>.

The election by a claimant to sue for restitution operates only to extinguish his right to sue for damages for conversion, and does not affirm the tortious act so as to treat it as a rightful one or put the defendant in the same position with regard to claims made by him in respect of the goods as if the conversion had been lawful<sup>7</sup>.

The right of the claimant to elect also occurs in the case of torts other than conversion<sup>8</sup>. Where the original taking of goods or assets is a trespass he may nevertheless sue for restitution<sup>9</sup>. Therefore where minerals have been wrongfully raised and sold he may recover the proceeds

of sale<sup>10</sup>; but where they have been raised and sold under a bona fide claim of right and the owner elects to sue for restitution, the defendant may set off a sum incurred in the cost of raising the minerals<sup>11</sup>. The right to elect has also been held to exist in the case of enticement of an apprentice<sup>12</sup>.

1 See PARA 151 ante.

2 See PARA 152 ante.

3 See PARA 153 ante.

4 Goods for this purpose includes a bill or cheque: see eg *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL. For the circumstances by which a party is put on inquiry on taking a cheque see *Rothschild v Corney* (1829) 9 B & C 388.

5 *Arris and Arris v Stukely* (1677) 2 Mod Rep 260 at 262; *Lamine v Dorrell* (1705) 2 Ld Raym 1216; *Glyn v Baker* (1811) 13 East 509; *Buchanan v Findlay* (1829) 9 B & C 738; *Oughton v Seppings* (1830) 1 B & Ad 241; *Young v Marshall* (1831) 8 Bing 43; *Marsh v Keating* (1834) 1 Bing NC 198 at 215, HL; *Powell v Rees* (1837) 7 Ad & El 426; *Rodgers v Maw* (1846) 15 M & W 444 at 448; *Neate v Harding* (1851) 6 Exch 349; *Lythgoe v Vernon* (1860) 5 H & N 180; *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA.

Where the proceeds of sale of goods wrongfully obtained were paid into a colonial bank by the wrongdoer for the purpose of being transmitted to its London branch, it was held that the owner of the goods could follow the proceeds into the hands of the bank and that bills of exchange received by the wrongdoer to the amount of the proceeds drawn by the colonial bank on its London branch were the property of the owner of the goods: *Comité des Assureurs Maritimes v Standard Bank of South Africa* (1883) Cab & El 87.

As to money or goods etc entrusted to an agent see AGENCY vol 1 (2008) PARA 144.

6 See *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 20, [1940] 4 All ER 20 at 31, HL, per Viscount Simon LC, and at 54 and 53 per Lord Porter (where it was not found necessary to decide the question); cf *Campbell v Fleming* (1834) 1 Ad & El 40.

7 *Hunter v Prinsep* (1808) 10 East 378 (wrongful sale of cargo by ship master; it was held that the owner was entitled to recover the proceeds from the shipowners without allowing for freight), explained in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL. As to the right of a ship's master to sell cargo see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 444.

8 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 12-13, [1940] 4 All ER 20 at 26, HL. The right would not exist in the case of certain torts, eg defamation and assault: *United Australia Ltd v Barclays Bank Ltd* supra.

9 *Powell v Rees* (1837) 7 Ad & El 426; *Neate v Harding* (1851) 6 Exch 349. See, however, *Morris v Tarrant* [1971] 2 QB 143, [1971] 2 All ER 920 (trespass to land).

10 *Powell v Rees* (1837) 7 Ad & El 426.

11 *Jegon v Vivian* (1871) 6 Ch App 742; and see *Hilton v Woods* (1867) LR 4 Eq 432; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, HL; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 43.

12 *Lightly v Clouston* (1808) 1 Taunt 112; doubted in *Foster v Stewart* (1814) 3 M & S 191 at 198.

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## 12. DEFENCES

### (1) INTRODUCTION

#### 165. Defences available to restitutionary claims.

Even though a claimant may be able to establish that a defendant has been unjustly enriched at his expense, the defendant may still be able to defeat the claimant's claim by reliance on a restitutionary defence<sup>1</sup>. The principal defences are: (1) change of position<sup>2</sup>; (2) estoppel<sup>3</sup>; (3) bona fide purchase<sup>4</sup>; (4) passing on<sup>5</sup>; (5) impossibility of counter-restitution<sup>6</sup>; (6) illegality<sup>7</sup>; and (7) incapacity<sup>8</sup>. Other defences of more general application, such as limitation<sup>9</sup>, are considered elsewhere in this work.

<sup>1</sup> See generally Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 843-914; Burrows *The Law of Restitution* (2nd Edn, 2002) Ch 15.

<sup>2</sup> See PARAS 166-169 post.

<sup>3</sup> See PARA 170 post.

<sup>4</sup> See PARA 171 post.

<sup>5</sup> See PARA 172 post.

<sup>6</sup> See PARA 173 post.

<sup>7</sup> See PARAS 174-179 post.

<sup>8</sup> See PARAS 180-184 post.

<sup>9</sup> See LIMITATION PERIODS.

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## (2) CHANGE OF POSITION

### 166. Recognition of the defence of change of position.

Traditionally, English law recognised a defence to a claim for restitution only where the defendant could show that he had relied to his detriment on a representation made by the claimant that the benefit was the defendant's (in other words, estoppel)<sup>1</sup>. However, the House of Lords has now recognised and established the defence of change of position to a claim in restitution<sup>2</sup>. The detail of the application and scope of the defence remain to be worked out on a case by case basis. There had been some earlier indications that the defence was emerging in English law<sup>3</sup>. Change of position has also been recognised in a number of other common law jurisdictions<sup>4</sup>.

<sup>1</sup> See ESTOPPEL. See also PARA 170 post.

<sup>2</sup> *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL.

<sup>3</sup> *Larner v LCC* [1949] 2 KB 683, [1949] 1 All ER 964, CA; *Barclays Bank v WJ Simms, Son and Cooke (Southern) Ltd* [1980] QB 677, [1979] 3 All ER 522; *R v Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd* [1988] AC 858, sub nom *Tower Hamlets London Borough Council v Chetnik Developments Ltd* [1988] 1 All ER 961, HL; *Citibank N/A v Brown Shipley & Co, Midland Bank plc v Brown Shipley & Co Ltd* [1991] 2 All ER 690 at 701-702 per Waller J.

<sup>4</sup> *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1, Can SC; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 66 ALJR 768, Aust HC; *Thomas v Houston Corbett & Co* [1969] NZLR 151, NZ CA (applying the New Zealand Judicature Act 1908 s 94B).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(2) CHANGE OF POSITION/167. Nature of the defence.

### 167. Nature of the defence.

The defence has been formulated broadly so as to be available to a person whose position has so changed that it would be inequitable in all of the circumstances to require him to make restitution or alternatively to make restitution in full<sup>1</sup>. In principle, the defence of change of position is concerned with the question of the continued existence of enrichment in the hands of the recipient. In each case it will be a question of fact whether there has been a change of position<sup>2</sup>.

Although it is intended that the defence should develop on a case by case basis in the usual way, it is clear that the defence will not be open to a person who has changed his position in bad faith, such as where he has paid away the money received with knowledge of the facts entitling the claimant to relief, and that it will not be available to a wrongdoer<sup>3</sup>. However, the courts are reluctant to introduce the concept of relative fault<sup>4</sup>.

The defence is a general defence. It is most likely to be relied upon by the recipient of a mistaken payment, but it can in principle be invoked in other situations, such as in response to a claim for total failure of consideration<sup>5</sup>. It may also be wide enough to include anticipatory reliance<sup>6</sup>.

1 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 580, [1992] 4 All ER 512 at 534, HL, per Lord Goff of Chieveley. The House of Lords adopted a broad view as to the application of the defence to the facts of the case. The change of position was the paying of winnings by the defendant gaming club to the thief on the basis that the money staked was his and therefore the club's to keep, whereas in fact it had been stolen from the claimant firm of solicitors. A strict approach to the application of the defence would have meant that the club was regarded as having changed its position only in respect of the receipt of the stakes on the winning bets, in that those winnings specifically related to and negated only the receipt of that particular benefit and not other losing bets. However, the approach taken by the House of Lords was to award restitution in respect of the overall enrichment to the club, taking account of the net position of all the bets and winnings, even though the overall amount staked had been much higher.

Other examples given by the House of Lords in *Lipkin Gorman (a firm) v Karpnale Ltd* supra (at 579 and 533) include the following situations: where a claimant pays money to a defendant under a mistake of fact and the defendant, acting in good faith, pays the money (or part of it) to charity, it would be unjust to require the defendant to make restitution to the extent that he had so changed his position; and where a thief steals money and pays it to a third party who gives it to charity, the third party should have a good defence to an action for money had and received.

See *Maersk Air Ltd v Expeditors International (UK) Ltd* [2003] 1 Lloyd's Rep 491 (defence partially available to defendant company whose employee raised fraudulent invoices to claimant).

2 See Goff and Jones *The Law of Restitution* (7th Edn, 2007) p 855.

3 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 580, [1992] 4 All ER 512 at 534, HL, per Lord Goff of Chieveley. Where there are grounds for believing that a payment received may not have been correctly made, paying away the money without first making inquiries constitutes acting in bad faith, making the defence unavailable: *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446, [2004] QB 985. See also *Barros Mattos Jnr v MacDaniels Ltd*, *Barros Mattos Jnr v General Securities and Finance Co Ltd* [2004] EWHC 1188 (Ch), [2004] 3 All ER 299 (recipient unable to put up a tainted claim to retention against victim's untainted claim for restitution); *Fea v Roberts* [2005] EWHC 2186 (Ch), 8 ITELR 231 (defence not available in case of wilful blindness).

4 See *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50 at [45], [2002] 1 All ER (Comm) 193 at [45].

5 *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545.

6 See *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193, where the Privy Council held that the defendant, who had changed his position in reliance on a future payment, could

rely on the defence of change of position. This approach was approved in *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [64] per Munby J. Cf *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545 at 565 per Clarke J.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(2) CHANGE OF POSITION/168. Causal link between the enrichment and the change of position.

### **168. Causal link between the enrichment and the change of position.**

There must be a change of position, causally linked to the mistaken receipt, which makes it inequitable for the recipient to be required to make restitution<sup>1</sup>. The mere fact that the defendant has spent the money, in whole or in part, does not of itself make it inequitable that he should be called on to repay it, because the expenditure might have been incurred by him in any event in the ordinary course of things<sup>2</sup>.

A defendant who cannot point to any particular transaction by way of a change of position may be able to establish the defence where he can show that he has generally increased his outgoings as a result of the receipt<sup>3</sup>. Typically, the change of position will take the form of a reduction in the assets of the defendant but, exceptionally, the change of position may take a non-pecuniary form, as in the case where the defendant proves that, as a result of the receipt of the benefit, he stayed in his existing job rather than move to a more lucrative job elsewhere<sup>4</sup>.

1 *Scottish Equitable plc v Derby* [2001] EWCA Civ 369 at [30], [2001] 3 All ER 818 at [30] per Robert Walker LJ, following the 'wide view' taken in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 580, [1992] 4 All ER 512 at 534, HL, per Lord Goff of Chieveley. The need for a sufficient causal link should not be narrowly applied; the important point is that there should be a relevant connection between the change of position and the actual or anticipated payment: *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [43] per Mummery LJ.

2 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 580, [1992] 4 All ER 512 at 534, HL, per Lord Goff of Chieveley.

3 See eg *Philip Collins Ltd v Davis* [2000] 3 All ER 808, where Jonathan Parker J adopted a fairly broad approach to the assessment of the extent of the defendants' change of position, finding that they had changed their position to the extent of one-half of the overpayments made by the claimant; *Scottish Equitable plc v Derby* [2001] EWCA Civ 369 at [33], [2001] 3 All ER 818 at [33] per Robert Walker LJ (it may be right for the court not to apply too demanding a standard of proof when an honest defendant says that he has spent an overpayment by improving his lifestyle, but cannot produce any detailed accounting).

4 See *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [39] per Mummery LJ.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(2) CHANGE OF POSITION/169. Ministerial receipt.

### **169. Ministerial receipt.**

An agent who has received money from a claimant on behalf of his principal and who would, if the money were not due, be liable to refund it, will have a good defence if, before becoming aware of the claim, he has paid the money away to his principal or has otherwise altered his position in relation to his principal in reliance on the payment<sup>1</sup>. In such circumstances, the claimant must sue the principal; but if the agent has been dealing as principal in the

transaction with the claimant this defence will not be available even though he may have accounted for the money received from the claimant<sup>2</sup>.

The question of the scope of the application of this defence in the light of the judicial recognition of the defence of change of position remains to be considered. In principle, it would appear to be merely a particular instance of the application of the change of position defence<sup>3</sup>.

1 *Buller v Harrison* (1777) 2 Cowp 565; *Continental Caoutchouc & Gutta Percha Co v Kleinwort Sons & Co* (1904) 9 Com Cas 240, CA; *Gowers v Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All ER 766, 54 TLR 550, CA; *Transvaal Delagoa Bay Investment Co v Atkinson* [1944] 1 All ER 579.

2 *Newall v Tomlinson* (1871) LR 6 CP 405; *Baylis v Bishop of London* [1913] 1 Ch 127, CA.

3 See *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202 at 207-208, CA, per Millett LJ.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(3) ESTOPPEL/170. Estoppel as a defence to a restitutionary claim.

### (3) ESTOPPEL

#### 170. Estoppel as a defence to a restitutionary claim.

In relation to restitutionary claims, the defence of estoppel<sup>1</sup> is in general available where the claimant has made a representation of fact which led the defendant to believe that he was entitled to treat the money received as if it were his own. Estoppel is an 'all-or-nothing' defence, in the sense that estoppel cannot operate pro tanto with the effect that where the defendant has innocently changed his position by disposing of only part of the money received in reliance on the claimant's representation, estoppel provides a defence to the whole of the claimant's claim, and not just in respect of that part of the money disposed of<sup>2</sup>. There might, however, be circumstances which would render it unconscionable for the defendant to retain a balance in his hands and there may also be circumstances which would make it unfair to allow the claimant to recover<sup>3</sup>.

Change of position does not require the defendant to establish a representation and, in this respect, is likely to be more readily available to a defendant. It has been suggested that estoppel by representation may wither away as a defence to a claim for restitution of money paid under a mistake of fact and that with the emergence of the defence of change of position, the court will no longer feel constrained to find that a representation has been made, in a borderline case, in order to avoid an unjust result<sup>4</sup>.

1 See generally ESTOPPEL. As to promissory estoppel see CONTRACT vol 9(1) (Reissue) PARA 1030 et seq.

2 *Avon County Council v Howlett* [1983] 1 All ER 1073, [1983] 1 WLR 605, CA.

3 *Avon County Council v Howlett* [1983] 1 All ER 1073 at 1078, [1983] 1 WLR 605 at 611-612, CA, per Eveleigh LJ; and see also *National Westminster Bank plc v Somer International (UK) Ltd* [2001] EWCA Civ 970 at [56], [2002] QB 1286 at [56], [2002] 1 All ER 198 at [56] per Clarke LJ. The exception in *Avon County Council v Howlett* supra was applied in *Scottish Equitable plc v Derby* [2001] EWCA Civ 369, [2001] 3 All ER 818 (see at [44] per Robert Walker LJ).

4 See *Scottish Equitable plc v Derby* [2001] EWCA Civ 369 at [48], [2001] 3 All ER 818 at [48] per Robert Walker LJ, who went on to state 'It can also be predicted, rather less confidently, that development of the law on a case by case basis will have the effect of enlarging rather than narrowing the exception recognised by this court in *Avon County Council v Howlett* [1983] 1 All ER 1073, [1983] 1 WLR 605, CA. That process might be hastened (or simply overtaken) if the House of Lords were to move away from the evidential origin of estoppel

by representation towards a more unified doctrine of estoppel, since proprietary estoppel is a highly flexible doctrine which, so far from operating as 'all or nothing', aims at 'the minimum equity to do justice'. As to change of position see PARAS 166-168 ante.

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#### **(4) BONA FIDE PURCHASE**

##### **171. Defence of bona fide purchaser for value without notice of equitable interests.**

Equitable claims normally may be enforced against a purchaser of the legal title to property, if that person's conscience is affected by notice of the claimant's equitable interest. A defendant who can show that he is a purchaser of the legal title for value and that he had no notice of any equitable interest can rely on the defence of bona fide purchase<sup>1</sup>.

If a defendant can rely on the defence, all persons claiming through him may also rely on the defence, even though they may have notice of the claimant's equitable interest<sup>2</sup>.

Unlike change of position (which assists a defendant only to the extent that his position has changed), in a case of bona fide purchase no inquiry will (in most cases) be made into the adequacy of the consideration<sup>3</sup>.

<sup>1</sup> *Clarke v Shee* (1774) 1 Cowp 197 at 200; *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 580-581, [1992] 4 All ER 512 at 534, HL, per Lord Goff of Chieveley; *Nelson v Larholt* [1948] 1 KB 339, [1947] 2 All ER 751; *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193.

<sup>2</sup> *Wilkes v Spooner* [1911] 2 KB 473, CA.

<sup>3</sup> *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 580-581, [1992] 4 All ER 512 at 534, HL, per Lord Goff of Chieveley.

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#### **(5) PASSING ON**

##### **172. Defence of 'passing on'.**

It has been indicated that in certain cases the fact that the claimant has passed on the cost of an enrichment conferred on the defendant (for example, a tax or levy), so that the burden has fallen on another, may provide a defence to the claimant's claim<sup>1</sup>. This point has not yet arisen for direct consideration. However, it has been held that the defence could not be raised in the context of a claim to recover net payments under an (invalid) interest rate swap transaction, where the net payee, the local authority, was refused leave to amend its defence to contend that the paying bank had not suffered any or any substantial loss in the transaction with the local authority, because the bank had entered into various hedging contracts with third parties intended to offset any risk arising from the contract with the local authority<sup>2</sup>.

1 *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 177-178, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 764, HL, per Lord Goff of Chieveley. See also *Marks and Spencer plc v Revenue and Customs Comrs* [2005] UKHL 53 at [25], [2005] STC 1254 at [25] per Lord Walker of Gestingthorpe (although he appears to wrongly cite the Australian case of *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 185 ALR 335 in support of his conclusions).

2 *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380, [1996] 4 All ER 733, CA. However, the possibility was left open that the defence might be available in 'taxation cases' involving an element of public law: *Kleinwort Benson Ltd v Birmingham City Council* supra at 388-391 and 738-741 per Evans LJ. See *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 at 984-985, 987 per Hobhouse J. See also *Baines & Ernst Ltd v Revenue and Customs Comrs* [2006] EWCA Civ 1040, [2006] STC 1632 (held tax not passed on).

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## (6) IMPOSSIBILITY OF COUNTER-RESTITUTION

### 173. Impossibility of counter-restitution.

In cases involving the setting aside of a transaction, such as on the ground of mistake, misrepresentation, duress or undue influence, it is a general principle that the parties must be capable of being returned to the position they were in before the transaction, so that the party seeking to set aside the transaction must be able to make counter-restitution<sup>1</sup> of any benefits received from the defendant pursuant to the transaction<sup>2</sup>. This principle is frequently referred to as the requirement that restitutio in integrum must be made as a condition of rescission. The court has the power to do what is practically just between the parties, and by so doing restore them substantially to the status quo<sup>3</sup>.

It has been held that counter-restitution will be impossible where the property transferred under the contract has disappeared or where its character has been completely altered<sup>4</sup>. The same conclusion has been reached in cases where the party seeking to set aside the transaction has consumed or disposed of the benefit transferred by the other party<sup>5</sup>. However, in principle it should be sufficient that a party who has disposed of a benefit received under a transaction which he would otherwise be entitled to have set aside can provide an equivalent benefit to the defendant<sup>6</sup>.

The defence will not succeed merely because the contract is executed<sup>7</sup> or because property transferred under the contract has declined in value<sup>8</sup>. As a condition of rescission, the claimant may be ordered to compensate the defendant for any deterioration of the property<sup>9</sup>.

1 See CONTRACT vol 9(1) (Reissue) PARA 986; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 831; MISTAKE vol 77 (2010) PARA 43. See also Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 271-276. It is not necessarily the case that a party wishing to obtain rescission of a contract on the ground of duress has to be able to provide counter-restitution: see *Halpern v Halpern* [2007] EWCA Civ 291, [2007] 3 All ER 478.

2 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL; *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876 at 884, CA, per Millett LJ, and at 887 per Morritt LJ. In principle, rescission for duress should be no different from rescission for other vitiating factors; however, the practical effect of counter-restitution would depend on the circumstances of the particular case: see *Halpern v Halpern* [2007] EWCA Civ 291 at [76], [2007] 3 All ER 478 at [76] per Carnwath LJ.

3 *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA, where the court set aside transactions obtained by the exercise of undue influence. Although it was impossible to put the parties back exactly in the position in which they were before, the transactions were set aside on the basis that it was possible to achieve 'practical justice' between the parties: *O'Sullivan v Management Agency and Music Ltd* supra at 458 and 366 per Dunn LJ. See also *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, Aust

HC. Cf *TSB Bank plc v Camfield* [1995] 1 All ER 951 at 956-958, [1995] 1 WLR 430 at 434-437, CA, per Nourse LJ. Given the principle of *restitutio in integrum*, a party seeking compensation for misrepresentation is entitled to rescind the whole of a contract, but not part of it: *De Molestina v Ponton* [2002] 1 All ER (Comm) 587, applying *TSB Bank plc v Camfield* supra.

4 *Clarke v Dickson* (1858) EB & E 148, where rescission of a contract for the purchase of shares in a partnership was refused on the ground that the partnership had, since the entry into the contract, been converted into a limited liability company. However, it should be noted that this was a decision at common law, before all courts were invested with the jurisdiction of equity to order an account of profits or make any necessary allowances for the deterioration of property transferred.

5 *Vigers v Pike* (1842) 8 Cl & Fin 562, HL; *Clarke v Dickson* (1858) EB & E 148 at 155 per Crompton J; *Sheffield Nickel and Silver Plating Co Ltd v Unwin* (1877) 2 QBD 214; *Ladywell Mining Co v Brookes* (1887) 35 ChD 400 at 414, CA, per Lindley LJ; *Thorpe v Fasey* [1949] Ch 649, [1949] 2 All ER 393.

6 In relation to shares, see *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 262, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 at 774, HL, where Lord Browne-Wilkinson indicated that a purchaser of shares in a publicly quoted company, who had disposed of them before seeking to set aside the purchase transaction, could provide substantial counter-restitution by purchasing identical shares on the market. See also *Re International Contract Co* (1872) 7 Ch App 485 at 487 per James LJ. Cf *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1994] 4 All ER 225 at 234, [1994] 1 WLR 1271 at 1280, CA, per Nourse LJ.

In relation to the benefit obtained by the provision of services, see *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA, where the claimant was able to obtain rescission even though the defendant had in fact provided valuable services under the contract (and which could not be in themselves restored). In doing practical justice, the claimant was required to pay the defendant's reasonable remuneration for the services provided.

7 *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA.

8 *Adam v Newbigging* (1888) 13 App Cas 308 at 330, HL, per Lord Herschell; *Armstrong v Jackson* [1917] 2 KB 822.

9 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1278-1279, HL, per Lord Blackburn; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 456, CA; *Wiebe v Butchart's Motors Ltd* [1949] 4 DLR 838, BC CA.

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## (7) ILLEGALITY

### 174. General rule: illegality as a defence to a claim in restitution.

The converse of the principle that a claimant may be able to rely on illegality as a ground of a claim in restitution is the general rule that a defendant may rely on the illegality of a transaction as a defence to a restitutionary claim<sup>1</sup>. In general, money paid under an illegal contract cannot be recovered<sup>2</sup>. The basis of the rule is public policy, so that the court will not lend its assistance to a claimant who must rely on an illegality in order to found his cause of action; the benefit to the defendant is regarded as incidental<sup>3</sup>.

Where a statute stipulates that contracts which do not comply with its provisions are illegal and void, the courts will not enforce such a prohibited contract<sup>4</sup>. However, if the statute does not expressly provide as to the effect of a failure to comply with its terms, the courts will consider the scope and basis of the prohibition. If the statute prohibits both parties from concluding or performing a contract when both or either of them have no authority to do so, the contract will be regarded as impliedly prohibited<sup>5</sup>. Where, however, the statute imposes a penalty if one party enters into a contract or prohibits him from entering into such a contract without authority, a determination of whether the contract is illegal and void will depend on

considerations of public policy in the light of the mischief which the statute was designed to prevent, its language, scope and purpose, the consequences for the innocent party and any other relevant considerations<sup>6</sup>.

Where a contract is legal in form, but is performed in an illegal manner, the court will consider the question whether the relevant statute impliedly prohibited the contract on the basis of public policy<sup>7</sup>.

1 This general rule is often expressed in the form of the maxims 'ex turpi causa non oritur actio' (ie 'no court will lend its aid to a man who founds his action upon an immoral or an illegal act') and 'in pari delicto potior est conditio defendentis' (ie 'where both parties are equally at fault the position of the defendant is the stronger'); see further CONTRACT vol 9(1) (Reissue) PARA 836 et seq. See also Goff and Jones *The Law of Restitution* (7th Edn, 2007) pp 605-634.

2 See CONTRACT vol 9(1) (Reissue) PARA 880 et seq.

3 *Holman v Johnson* (1775) 1 Cowp 341 at 343 per Lord Mansfield (and see also *Clarke v Shee* (1774) 1 Cowp 197 at 200 per Lord Mansfield; *Browning v Morris* (1778) 2 Cowp 790 at 792 per Lord Mansfield; *Lowry v Bourdieu* (1780) 2 Doug KB 468 at 470 per Lord Mansfield); *Simpson v Bloss* (1816) 7 Taunt 246; *Ex p Brookes* (1822) 1 Bing 105; *Begbie v Phosphate Sewage Co Ltd* (1875) LR 10 QB 491 (affd (1876) 1 QBD 679, CA); *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, CA; *Wild v Simpson* [1919] 2 KB 544, CA; *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1; *Berg v Sadler and Moore* [1937] 2 KB 158, [1937] 1 All ER 637, CA; *Morgan v Ashcroft* [1938] 1 KB 49, [1937] 3 All ER 92, CA; *Edler v Auerbach* [1950] 1 KB 359, [1949] 2 All ER 692; *Ashmore, Benson, Pease & Co Ltd v AV Dawson* [1973] 2 All ER 856, [1973] 1 WLR 828, CA; *Spector v Ageda* [1973] Ch 30, [1971] 3 All ER 417.

4 *Archbolds (Freightage) Ltd v S Spanglett Ltd (Randall, third party)* [1961] 1 QB 374 at 388, CA, per Pearce LJ; *Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat* [1988] QB 216, [1987] 2 All ER 152, CA. See CONTRACT vol 9(1) (Reissue) PARA 867.

5 *Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat* [1988] QB 216 at 273, [1987] 2 All ER 152 at 176, CA, per Kerr LJ.

6 *Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat* [1988] QB 216 at 273, [1987] 2 All ER 152 at 176, CA, per Kerr LJ. In respect of the consequences to the innocent party, the court will take into account the fact that avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute: see *Archbolds (Freightage) Ltd v S Spanglett Ltd (Randall, third party)* [1961] 1 QB 374 at 390, [1961] 1 All ER 417 at 425, CA, per Devlin LJ; *Fuji Finance Inc v Aetna Life Insurance Co Ltd* [1995] Ch 122 at 134-137, [1994] 4 All ER 1025 at 1034-1037 per Sir Donald Nicholls V-C.

7 *Anderson Ltd v Daniel* [1924] 1 KB 138 at 150, CA, per Atkin LJ; *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 at 283-284, [1956] 3 All ER 683 at 687-688 per Devlin J; *Shaw v Groom* [1970] 2 QB 504 at 516, [1970] 1 All ER 702 at 705, CA, per Harman LJ; *Ashmore, Benson, Pease & Co Ltd v AV Dawson* [1973] 2 All ER 856, [1973] 1 WLR 828, CA.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(7) ILLEGALITY/175. Exceptions to the general rule.

### 175. Exceptions to the general rule.

There are three situations where a claim in restitution may succeed despite an illegality involved in the relevant transaction: (1) where the parties are not equally at fault (non in pari delicto)<sup>1</sup>; (2) withdrawal from an executory illegal contract<sup>2</sup>; and (3) where the claimant can establish that the defendant retains property belonging to him without relying on the illegal contract<sup>3</sup>.

1 See PARA 176 post.

<sup>2</sup> See PARA 177 post.

<sup>3</sup> See PARA 178 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(7) ILLEGALITY/176. Parties not equally at fault.

### **176. Parties not equally at fault.**

Where the law in question, against which the transaction offends, was intended for the protection of one of the parties to the transaction, a claim by that party for restitution of benefits conferred on the defendant will not be defeated by a plea of illegality<sup>1</sup>. The claimant will generally not be required to make counter-restitution of any benefit conferred on him by the defendant pursuant to the transaction, if to do so would result directly or indirectly in giving effect to a transaction which has been declared illegal by statute<sup>2</sup>. The claimant must establish that he falls within the class of persons whom the statutory provision in question was designed to protect. Thus, for example, a law designed for the regulation of racecourses and other such matters in the interests of the general public was held not to be intended to provide protection to a bookmaker who claimed that he had been overcharged by the defendants who operated a racecourse<sup>3</sup>.

Where a statute which renders a transaction illegal expressly provides for a right of recovery to a person in the position of the claimant, he will, obviously, be entitled to recover notwithstanding the illegality<sup>4</sup>.

Where money has been paid under an illegal contract, but the claimant is unaware of the illegality because of a mistake, he will be entitled to recover the payment, if he has not received what he bargained for, on the basis of a total failure of consideration<sup>5</sup>. If the contract is capable of being performed in a legal manner, but the defendant, without the claimant's knowledge, performs illegally, the claimant may nevertheless succeed in a claim for restitution<sup>6</sup>. However, the claimant must withdraw from the transaction if he discovers the illegality; and if he does so, he will be entitled to recover the value of any services provided by way of a claim in quantum meruit<sup>7</sup>.

The claimant will also be able to succeed in a restitutionary claim, despite an illegality in the underlying transaction, if the claimant was induced to enter into the transaction by fraud which concealed the illegal nature of the transaction<sup>8</sup> or by duress, which compelled both the making of the contract and the conferral of any benefits by the claimant<sup>9</sup>.

<sup>1</sup> *Clarke v Shee* (1774) 1 Cowp 197 at 200 per Lord Mansfield; *Browning v Morris* (1778) 2 Cowp 790 at 792 per Lord Mansfield; *Lowry v Bourdieu* (1780) 2 Doug KB 468 at 471-472 per Lord Mansfield; *Smith v Bromley* (1760) 2 Doug KB 696n; *Williams v Hedley* (1807) 8 East 378; *Bloxsome v Williams* (1824) 3 B & C 232; *Barclay v Pearson* [1893] 2 Ch 154; *Lodge v National Union Investment Co* [1907] 1 Ch 300; *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192, [1960] 1 All ER 177, PC. As to illegal contracts see PARA 174 ante; and CONTRACT vol 9(1) (Reissue) PARA 836 et seq.

<sup>2</sup> *Chapman v Michaelson* [1909] 1 Ch 238, CA; *Cohen v Lester (J) Ltd* [1939] 1 KB 504, [1938] 4 All ER 188; *Kasumu v Baba-Egbe* [1956] AC 539, [1956] 3 All ER 266, PC. Cf *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300 at 312 per Parker J. This latter decision has been confined by the later authorities as limited to claims for 'true equitable relief' (albeit that this term is not defined) and the exercise of the court's discretion must not conflict with the provisions or intent of the statute: see *Chapman v Michaelson* [1909] 1 Ch 238 at 242, CA, per Cozens-Hardy MR, and at 243 per Farwell LJ; *Kasumu v Baba-Egbe* supra at 549 and 270. See CONTRACT vol 9(1) (Reissue) PARA 867.

<sup>3</sup> *Green v Portsmouth Stadium Ltd* [1953] 2 QB 190, [1953] 2 All ER 102, CA (where the statutory provision in question was the Betting and Lotteries Act 1934 s 13(1) (now repealed)). See also *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 931-932, (1993) 91 LGR 323 at 370,

where Hobhouse J held that the claimant bank could not avoid the illegality of its transaction because the statute in question, the Local Government Act 1972, was not passed for the protection of banks.

4 *Gray v Southouse* [1949] 2 All ER 1019 at 1020, where a tenant who paid a premium to a landlord, contrary to the provisions of the Rent Restrictions Acts, was held entitled to recover it.

5 *Oom v Bruce* (1810) 12 East 225; *Hentig v Staniforth* (1816) 5 M & S 122; *Siffken v Allnutt* (1813) 1 M & S 39. There are some authorities which deny recovery if the mistake in question was one of law, rather than of fact: see *Nash v Stevenson Transport Ltd* [1936] 2 KB 128, [1936] 1 All ER 906, CA; *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192, [1960] 1 All ER 177, PC. However, in the light of the decision in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL (see PARA 36 ante), a payment made under a mistake of law is now likely to be recoverable.

6 *Re Mahmoud and Ispahani* [1921] 2 KB 716 at 729, CA; *Chai Sau Yin v Liew Kwee Sam* [1962] AC 304 at 311, [1962] 2 WLR 765 at 768, PC.

7 *Clay v Yates* (1856) 1 H & N 73; *Cowan v Milbourn* (1867) LR 2 Exch 230.

8 *British Workman's and General Assurance Co Ltd v Cunliffe* (1902) 18 TLR 502, CA; *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243, HL; *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 KB 482, CA; *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1 (where the claim was rejected, despite fraud on the part of the defendant, because the claimant was always aware of the illegal nature of the transaction).

9 *Smith v Cuff* (1817) 6 M & S 160; *Bradshaw v Bradshaw* (1841) 9 M & W 29; *Horton v Riley* (1843) 11 M & W 492; *Atkinson v Denby* (1861) 6 H & N 778 (affd 7 H & N 934); *Williams v Bayley* (1866) LR 1 HL 200; cf *Miller v Aris* (1800) 3 Esp 231; *Townson v Wilson* (1808) 1 Camp 396; *Wilson v Ray* (1839) 10 Ad & El 82; *Re Campbell, ex p Wolverhampton and Staffordshire Banking Co* (1884) 14 QBD 32, DC; *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173, CA.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(7) ILLEGALITY/177. Voluntary withdrawal from an executory transaction.

### 177. Voluntary withdrawal from an executory transaction.

A claimant will be entitled to recover a benefit conferred under an illegal contract if he seeks to withdraw from the contract and recover the benefit while the contract remains executory<sup>1</sup>. A claimant may be able to take advantage of this principle even though the contract does not remain wholly executory, provided that the illegal purpose in question has not in fact been carried out<sup>2</sup>. The rule has also been applied on the basis that the policy behind it is to encourage withdrawal from a proposed fraud before it is implemented<sup>3</sup>. However, the claimant will not be entitled to restitution if the agreement has been substantially carried into effect, albeit not wholly executed<sup>4</sup>. It must also still be possible for the claimant to make counter-restitution of any benefits received on equitable terms<sup>5</sup>.

Some cases have indicated that, in order to recover, the claimant must be genuinely repentant of his illegality, and that he will not be permitted to claim restitution merely because his illegal purpose has been frustrated<sup>6</sup>. However, it has since been stated that genuine repentance is not required and that voluntary withdrawal from an illegal transaction when it has ceased to be needed is sufficient<sup>7</sup>.

1 *Lowry v Bourdieu* (1780) 2 Doug KB 468 at 471, DC, per Buller J; *Tappenden v Randall* (1801) 2 Bos & P 467; *Aubert v Walsh* (1810) 3 Taunt 277; *Busk v Walsh* (1812) 4 Taunt 290 at 292-293, DC, per Mansfield CJ; *Hastelow v Jackson* (1828) 8 B & C 221 at 224-225, DC, per Bayley J; *Varney v Hickman* (1847) 5 CB 271, DC. The period during which the claimant may withdraw and claim restitution is referred to as the 'locus poenitentiae'. As to illegal contracts see PARAS 174-176 ante; and CONTRACT vol 9(1) (Reissue) PARA 836 et seq.

2 *Taylor v Bowers* (1876) 1 QBD 291, CA, where the claimant made an agreement for the sale of his goods in an attempt to defeat his creditors from seizing them and, in partial execution of his scheme, delivered the goods to the purchaser. No settlement with the creditors was reached and the claimant sought to withdraw from the contract with the purchaser. However, the purchaser had in the meantime sold and delivered the

goods to one of the claimant's creditors, the defendant. The majority of the Court of Appeal (Mellish LJ and Bagallay JA) held that the claimant was entitled to recover the goods on the basis that the illegal purpose of the agreement with the purchaser had not been carried out. However, James LJ relied on the point that the claimant could establish title to the goods without regard to the illegal contract.

3 *Tribe v Tribe* [1996] Ch 107 at 120-121, 123, [1995] 4 All ER 236 at 247, 249, CA, per Nourse LJ, and at 133-134 and 258 per Millett LJ, where a father transferred shares in his company to his son, in order to safeguard his assets from a potential claim by his creditors. In the event the claim was not pursued and the father sought the return of the shares, but the son refused. The father was held entitled to recover, despite the illegal nature of the transaction with his son, because the illegal purpose had not been carried out, in that no creditor had been deceived by the transaction.

4 *Kearley v Thomson* (1890) 24 QBD 742 at 746-747, CA, per Fry LJ, where the claimant agreed to and did pay money to the defendant, a firm of solicitors acting for a petitioning creditor, in return for their agreement (with their client's consent) not to attend the public examination of a bankrupt or oppose his order for discharge. The solicitors did not attend, but before the application for discharge had been made, the claimant sought the return of the payment. The action failed because there had been a partial carrying into effect of the claimant's illegal purpose to a substantial extent.

5 *South Western Mineral Water Co Ltd v Ashmore* [1967] 2 All ER 953 at 960, [1967] 1 WLR 1110 at 1127 per Cross J.

6 *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1 at 16 per Lush J; *Alexander v Rayson* [1936] 1 KB 169 at 190, 154 LT 205 at 210, CA, per Romer LJ; *Berg v Sadler and Moore* [1937] 2 KB 158 at 165, CA; *Parker (Harry) Ltd v Mason* [1940] 2 KB 590 at 608-609, [1940] 4 All ER 199 at 202-203, CA, per Luxmoore LJ; *Bigos v Bousted* [1951] 1 All ER 92 at 95-96 per Pritchard J; *Chettiar v Chettiar* [1962] AC 294 at 302, [1962] 1 All ER 494 at 497, PC.

7 *Tribe v Tribe* [1996] Ch 107 at 135, [1995] 4 All ER 236 at 259-260, CA, per Millett LJ (the cases which suggest that repentance is a necessary condition were, however, not discussed); *Collier v Collier* [2002] EWCA Civ 1095, [2002] All ER (D) 466 (Jul).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(7) ILLEGALITY/178. Proof of title without reliance on illegal contract.

### 178. Proof of title without reliance on illegal contract.

Despite the existence of an illegal purpose between the parties, if a claimant can establish title to property, whether legal or equitable, without relying on or giving evidence of the illegality, the illegality will not defeat the claim<sup>1</sup>. Similarly, if the claimant does not need to adduce evidence of illegality in order to establish his claim, but only in order to rebut a defence raised by the defendant, the claim will still be allowed<sup>2</sup>.

1 *Tinsley v Milligan* [1994] 1 AC 340 at 369-371, [1993] 3 All ER 65 at 84-87, HL, per Lord Browne-Wilkinson. The claimant and the defendant had purchased a house, with the assistance of a mortgage, providing the balance of the price in equal shares, but the title to the house was transferred into the sole name of the defendant, so that the claimant could operate a fraud on the Department of Social Security. The House of Lords allowed the action for a declaration that the property was held on trust for sale in equal shares. The decision was based on the existence of a resulting trust, which was established merely by the evidence that the parties had contributed to the purchase price in equal shares, that there was a common understanding that they owned the property equally and that the legal title was vested in one party alone. The claimant did not need to rely on the illegal purpose of the transaction in order to establish her claim. See also *Lowson v Coombes* [1999] Ch 373, [1999] 2 WLR 720, CA; *Collier v Collier* [2002] EWCA Civ 1095 at [79]-[81], [2002] All ER (D) 466 (Jul) per Chadwick LJ.

See also *Taylor v Chester* (1869) LR 4 QB 309; *Alexander v Rayson* [1936] 1 KB 169, 154 LT 205, CA; *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 at 69-70, [1944] 2 All ER 579 at 582-583, CA, per Du Parc LJ.

As to illegal contracts see PARAS 174-177 ante; and CONTRACT vol 9(1) (Reissue) PARA 836 et seq.

2 *Silverwood v Silverwood* (1997) 74 P & CR 453, CA, where a grandmother paid approximately £21,000 into the accounts of her grandchildren in order to enable her to obtain income support from the Department of Social Security. Her executor sought the return of the money, claiming that it was held on resulting trust. The grandchildren raised the defence that the payments constituted a gift, and the executor adduced evidence of the illegal purpose of the transaction in order to rebut that defence. The Court of Appeal considered that the test was whether the claimant placed necessary reliance on the illegality in proving his action; since the only relevance of the evidence of illegality was to counter the defence, 'it would be absurd as well as unjust if a claimant, claiming a resulting trust, could not lead evidence of fraud in order to disprove a spurious defence' (at 457 per Peter Gibson LJ).

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(7) ILLEGALITY/179. Proprietary claims.

### **179. Proprietary claims.**

A claimant who can show that he comes within the category of persons intended to be protected by a statutory provision which renders a transaction illegal<sup>1</sup>, and so is able to recover money paid under the contract by way of a personal claim, will not, however, have an equitable proprietary claim in respect of the money paid under the contract<sup>2</sup>.

1 As to illegal contracts see PARAS 174-178 ante; and CONTRACT vol 9(1) (Reissue) PARA 836 et seq. As to contracts affected by statute see CONTRACT vol 9(1) (Reissue) PARA 876.

2 *Box v Barclays Bank plc* [1998] Lloyd's Rep Bank 185, where the claimants deposited money with a company which ran an unauthorised deposit-taking business, contrary to statute. The money was deposited by the company in an account with the defendant bank. The account was always overdrawn. While the claimants had a personal action against the company for the recovery of the money paid (which was worthless) the court refused to impose a constructive trust to enable the claimants to recover the money from the bank.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(8) INCAPACITY/180. Incapacity as a defence to a claim in restitution.

## **(8) INCAPACITY**

### **180. Incapacity as a defence to a claim in restitution.**

Incapacity<sup>1</sup> may operate as a ground for claiming restitution<sup>2</sup>. However, incapacity can also operate as a defence to a restitutionary claim. There are two principal situations where the point may arise: (1) human incapacity, such as infancy<sup>3</sup>; and (2) corporate incapacity, such as the ultra vires acts of a company<sup>4</sup>.

1 As to incapacity see CONTRACT vol 9(1) (Reissue) PARA 630.

2 See PARAS 138-144 ante.

3 See PARAS 181-183 post.

4 See PARA 184 post.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(8) INCAPACITY/181. Incapacity of minors.

### 181. Incapacity of minors.

At common law it has been held that a minor has a defence to an action by an adult for restitution of money paid pursuant to an unenforceable contract (on the ground of the defendant's minority)<sup>1</sup>. In equity the courts had a power to grant some relief, compelling the minor defendant to make restitution of benefits received, provided that in doing so equity did not enforce a contract which was void at common law<sup>2</sup>. The position is now governed by the Minors' Contracts Act 1987. In relation to contracts entered into after the commencement of the Act which are unenforceable against the defendant (or which he repudiates) because he was a minor when the contract was made, the court may if it is just and equitable to do so, require the defendant to transfer to the claimant any property acquired by the defendant under the contract, or any property representing it<sup>3</sup>.

1 *Cowern v Nield* [1912] 2 KB 419 (claim for return of money paid in advance for clover and hay of unsatisfactory quality supplied by the defendant minor); *R Leslie Ltd v Sheill* [1914] 3 KB 607, CA (claim for return of loan of £400 to minor). In the latter case, it was said that the action would be rejected because to allow it would be to enforce in a roundabout way an unenforceable contract (at 613 per Lord Sumner, and at 626 per AT Lawrence J). As to the incapacity of minors see further CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq; CONTRACT vol 9(1) (Reissue) PARA 630.

2 *Eson v Nicholas* (1733) 2 Eq Cas Abr 488; *Clarke v Cobley* (1789) 2 Cox Eq Cas 173; *Stikeman v Dawson* (1847) 1 De G & Sm 90; *Re King, ex p Unity Joint Stock Mutual Banking Association* (1858) 3 De G & J 63; *Levene v Brougham* (1909) 25 TLR 265, CA; *Stocks v Wilson* [1913] 2 KB 235 (doubted in *R Leslie Ltd v Sheill* [1914] 3 KB 607 at 618-619, CA, per Lord Sumner).

3 See the Minors' Contracts Act 1987 s 3(1). There are no decided cases in relation to this provision. The court's discretion may be influenced by the judicial recognition of the defence of change of position: *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; and see PARA 166 et seq ante.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(8) INCAPACITY/182. Minors' liability for necessities.

### 182. Minors' liability for necessities.

The defence of incapacity by minority<sup>1</sup> is restricted in relation to the supply of necessary goods or services. In the case of the sale and delivery of necessary goods to a minor, he must pay a reasonable price for the goods<sup>2</sup>. At common law, a contract for necessities, whether goods or services, will bind a minor, provided that it is not onerous<sup>3</sup>. However, if the contract is onerous, the minor will not be bound by it, but will nevertheless be liable to pay a reasonable price for necessary goods or services received by him pursuant to it<sup>4</sup>.

1 As to the incapacity of minors see further CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq; CONTRACT vol 9(1) (Reissue) PARA 630.

2 See the Sale of Goods Act 1979 s 3(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 37.

3 *Walter v Everard* [1891] 2 QB 369, CA; *Nash v Inman* [1908] 2 KB 1, CA; *Roberts v Gray* [1913] 1 KB 520 at 525-526, CA; *Doyle v White City Stadium Ltd* [1935] 1 KB 110, CA.

4 *Nash v Inman* [1908] 2 KB 1, CA; *Roberts v Gray* [1913] 1 KB 520, CA.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(8) INCAPACITY/183. Mental incapacity and drunkenness.

### **183. Mental incapacity and drunkenness.**

A person who is mentally incapable of making a contract, whether by reason of illness or drunkenness<sup>1</sup>, will be able to set it aside only if he can show that his condition was known to the other party at the time when the contract was made such that the other party knew him to be incapable of understanding the transaction<sup>2</sup>. If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them<sup>3</sup>.

1 See CONTRACT vol 9(1) (Reissue) PARAS 630, 717; MENTAL HEALTH vol 30(2) (Reissue) PARA 604.

2 *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599 at 601, CA; *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC (both cases involving mental illness). There is little authority specifically in relation to drunkenness: see *Gore v Gibson* (1845) 13 M & W 623; *Moulton v Camroux* (1849) 4 Exch 17; *Matthews v Baxter* (1873) LR 8 Exch 132.

3 See the Mental Capacity Act 2005 s 7. See also MENTAL HEALTH vol 30(2) (Reissue) PARA 604.

Halsbury's Laws of England/RESTITUTION (VOLUME 40(1) (2007 REISSUE) PARAS 1-200)/12. DEFENCES/(8) INCAPACITY/184. Corporate incapacity.

### **184. Corporate incapacity.**

At common law a contract entered into by a company in excess of the powers granted to it expressly or impliedly by statute or its memorandum of association was regarded as void<sup>1</sup>. However, this rule remains relevant only in respect of a contract entered into by a company which is incorporated by special statute or by royal charter. In respect of companies incorporated under the companies legislation, the defence of ultra vires in relation to a claim will rarely succeed. It is now provided that the validity of an act done by a company is not to be called into question on the ground of lack of capacity by reason of anything in the company's memorandum<sup>2</sup>. The power of the board of directors to bind a company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution, in respect of persons dealing with the company in good faith<sup>3</sup>. In relation to the requirement of dealing in good faith, there are presumptions that a person is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution<sup>4</sup> and that a person will be regarded as having acted in good faith unless the contrary is proved<sup>5</sup>. A party to a transaction with a company is not bound to inquire whether it is permitted by the company's memorandum or as to any limitations on the powers of the board of directors to bind the company or authorise others to do so<sup>6</sup>.

1 *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653, HL. However, notwithstanding the lack of authority on the part of the company, it may be liable to pay for services rendered and accepted by the company, which if they had not been performed by the claimant, would have had to have been performed by someone else: see *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066, CA (claimant performed role of managing director).

2 See the Companies Act 1985 s 35(1) (as substituted); and COMPANIES vol 14 (2009) PARA 265. As from a day to be appointed, the Companies Act 1985 s 35(1) is repealed by the Companies Act 2006 s 1295, Sch 16 and replaced by s 39 (not yet in force). At the date at which this volume states the law no such day had been appointed.

3 See the Companies Act 1985 s 35A(1) (as added); and COMPANIES vol 14 (2009) PARA 263. As from a day to be appointed, the Companies Act 1985 s 35A is repealed by the Companies Act 2006 s 1295, Sch 16 and replaced by s 40 (not yet in force). At the date at which this volume states the law no such day had been appointed.

4 See the Companies Act 1985 s 35A(2)(b) (as added); and COMPANIES vol 14 (2009) PARA 263. See note 3 *supra*.

5 See *ibid* s 35A(2)(c) (as added); and COMPANIES vol 14 (2009) PARA 263. See note 3 *supra*.

6 See *ibid* s 35B (as added); and COMPANIES vol 14 (2009) PARA 263. As from a day to be appointed, the Companies Act 1985 s 35B is repealed by the Companies Act 2006 s 1295, Sch 16 and replaced by s 40 (not yet in force). At the date at which this volume states the law no such day had been appointed.